Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

U.S. Customs Service
- T.D. 86-76 Through 86-87
- C.S.D. 86-11 Through 86-16
- General Notice

U.S. Court of International Trade
- Slip Op. 86-38 Through 86-40
- Notice of Proposed Rule Changes

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 101

(T.D. 86–76)

Customs Regulations Amendment Relating to the Customs Field Organization; Davenport, Iowa, and Rock Island and Moline, Illinois

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This notice changes the field organization of the Customs Service by establishing a new port of entry, on a 2-year trial basis, at Davenport, Iowa, and Rock Island and Moline, Illinois. This change is being made as part of Customs continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public.

EFFECTIVE DATE: May 16, 1986.

FOR FURTHER INFORMATION CONTACT: Richard Coleman, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

Background

Customs ports of entry are places (seaports, airports, or land border ports) designated by the Secretary of the Treasury where Customs officers or employees are assigned to accept entries of merchandise, clear passengers, collect duties, and enforce the various provisions of Customs and related laws.

The Quad-City Development Group filed an application with Customs requesting the establishment of a new Customs port of entry at Davenport, Iowa, and Rock Island and Moline, Illinois. A review of that application confirmed that the proposed port met the minimum Customs criteria for establishing ports of entry. These standards, published as T.D. 82–37 in the Federal Register on March 9, 1982 (47 FR 10137), list 2,500 consumption entries per year as the

minimum, potential Customs workload for establishment of a port of entry. The Davenport-Rock Island-Moline port committed itself to 3738 consumption entries per year in its application, approximately 150 percent of the 2,500 minimum required.

A notice proposing the establishment of the Davenport-Rock Island-Moline port of entry was published in the Federal Register on October 17, 1985 (50 FR 42035). In that notice, Customs stated that it was not certain if the major importers in the proposed port area would choose to incur the extra expense of importing their merchandise by in-bond shipments to the proposed port area, rather than to continue the simple and less expensive clearance of the merchandise at the first port of arrival at the U.S.-Canadian border or elsewhere. Therefore, the notice indicated that the port, if established, would be done so on a 2-year trial basis. Customs believes that a 2-year period will provide sufficient time for the port to establish itself and attract business. At the end of the 2-year period, the practicality of maintaining a port of entry at Davenport-Rock Island-Moline will be reevaluated in light of the actual Customs workload. The notice solicited public comment on the matter.

By T.D. 86-14, published in the Federal Register on February 5, 1986 (51 FR 4559), the criteria used in evaluating applications to establish ports of entry and stations were revised. The revisions reflect the increased minimum value for commercial entries, delete references to informal entries, and require a commitment by any applicant that is attempting to qualify for port or station status by satisfying the cargo workload standard (2,500 consumption entries), to make optimal use of electronic data transfer capability to permit intergration with Customs Automated Commercial System (ACS). Future port and station applicants must comply with T.D. 86-14, as well as with the applicable criteria in T.D. 82-37.

Discussion of Comments

All of the comments received in response to the notice favored establishment of the port. The commenters cited the benefits that such a port would provide to the region's growing international trade business as well as the over-all positive effect on the area's economic and employment outlook.

After analysis of the comments and further review of the matter, Customs is establishing, on a 2-year trial basis, a port of entry at Davenport, Iowa, and Rock Island and Moline, Illinois.

Changes in the Customs Field Organization

The Secretary of the Treasury is advised by the Commissioner of Customs in matters affecting the establishment, abolishment, or other change in ports of entry. Customs ports of entry are established under the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and dele-

gated to the Secretary of the Treausury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949-1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101-5 (47 FR 2449).

Customs has determined that it is in the public interest to establish, on a 2-year trial basis, a port of entry at Davenport, Iowa, and Rock Island and Moline, Illinois. The limits of the port of entry of Davenport-Rock Island-Moline are as follows:

In Rock Island County, Illinois, the Townships of Andalusia, Blackhawk, Rock Island, South Rock Island, Moline, South Moline, Coal Valley, Hampton, Zuma, and Coe; in Henry County, Illinois, the Townships of Colona, Hanna, and Edford; and in Scott County, Iowa, the Townships of Buffalo, Blue Grass, Hickory Grove, Sheridan, Lincoln, LeClaire, Pleasant Valley, Bettendorf, and that area of the City of Davenport enclosed within the present limits of these townships.

List of Subjects In 19 CFR Part 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

PART 101—GENERAL PROVISIONS

To reflect this change, the list of Customs regions, districts, and ports of entry in § 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended by adding, "Davenport, Iowa, and Rock Island and Moline, Ill., including the territory described in T.D. 86 - 76." directly below, "CHICAGO, ILL., including territory described in T.D. 71-121." in the column headed, "Ports of entry" in the Chicago, Illinois district.

Executive Order 12291

Because this will not result in a "major rule" as defined in § 1(b) of E.O. 12291, the regulatory impact analysis and review prescribed by § 3 of that E.O. is not required.

Regulatory Flexibility Act

Pursuant to the provisions of § 605(b) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*), it is certified that the regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, the regulation is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Customs routinely establishes and expands Customs ports of entry throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although this amendment may have a limited effect upon some small entities in the area affected, it is not expected to be significant because estab-

lishing and expanding port limits at Customs ports of entry in other areas has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Act. Nor is it expected to impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

Drafting Information

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

William von Raab,
Commissioner of Customs.

Approved: April 3, 1986.
Francis A. Keating II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, April 16, 1986 (51 FR 12843)]

(T.D. 86-77)

Quarterly Rates of Exchange

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of section 522(c), Tariff Act of 1930, as amended (31 USC 372(c)), for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Quarter beginning: April 1, 1986 through June 30, 1986.

Country	Name of currency	U.S. dollars
Australia	Dollar	.72200
Austria	Schilling	.060827
Belgium	Franc	.020877
Brazil	Cruziero	.72254
Canada	Dollar	.718236
China, P.R.	Renminbi Yuan	.309713
Denmark	Krone	.115714
Finland	Markka	.190767
France	Franc	.139130
Germany	Deutsche Mark	.426803
Hong Kong	Dollar	.128008
India	Rupee	.080451
Iran	Rial	N/A

Country	Name of currency	U.S. dollars
Ireland	Pound	1.3000
Italy	Lira	.000627
Japan	Yen	.005613
Malaysia	Dollar	.384098
Mexico	Peso	N/A
Netherlands	Guilder	.378831
New Zealand	Dollar	.54200
Norway	Krone	.137155
Philippines	Peso	N/A
Portugal	Escudo	.006585
Republic of South Africa	Rand	.46750
Singapore	Dollar	.459559
Spain	Peseta	.006833
Sri-Lanka	Rupee	.036163
Sweden	Krona	.135740
Switzerland	Franc	.512295
Thailand	Baht (tical)	.037793
United Kingdom	Pound	1.4710
Venezuela	Bolivar	N/A

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-78)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
March 3, 1986	$0.007215
March 4, 1986	.007257
March 5, 1986	.007225
March 6, 1986	.007117
March 7, 1986	.007148
Israel shekel:	
March 3-7, 1986	N/A

South Korea won:	
March 3–4, 1986	.001128
March 5, 1986	.001129
March 6, 1986	.001128
March 7, 1986	.001127
Taiwan N.T. dollar:	
March 3, 1986	.025602
March 4, 1986	.025471
March 5, 1986	.025497
March 6, 1986	.025523
March 7, 1986	.025543

(LIQ-03-01 S:COM CIE)

Dated: March 7, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-79)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
March 10, 1986	.007037
March 11, 1986	.007092
March 12, 1986	.007077
March 13, 1986	.007003
March 14, 1986	.007092
Israel shekel:	
March 10–14, 1986	N/A
South Korea won:	
March 10, 1986	.001128
March 11–12, 1986	.001127
March 13, 1986	.001128
March 14, 1986	.001127
Taiwan N.T. dollar:	
March 10, 1986	.025556

March 11, 1986	N/A
March 12-13, 1986	.025543
March 14, 1986	.025556

(LIQ-03-01 S:COM CIE)

Dated: March 14, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-80)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations, (19 CFR 159, Subpart C).

Greece drachma:	
March 17, 1986	$0.007123
March 18, 1986	.007135
March 19, 1986	.007105
March 20, 1986	.007128
March 21, 1986	.007148
Israel shekel:	
March 17-21, 1986	N/A
South Korea won:	
March 17-18, 1986	.001128
March 19, 1986	.001129
March 20, 1986	.001128
March 21, 1986	.001129
Taiwan N.T. dollar:	
March 17, 1986	.025575
March 18, 1986	.025615
March 19, 1986	.025648
March 20, 1986	.025681
March 21, 1986	.025714

(LIQ-03-01 S:COM CIE)

Dated: March 21, 1986.

ANGELA, DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-81)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations, (19 CFR 159, Subpart C).

Greece drachma:	
March 24, 1986	$0.007027
March 25, 1986	.006920
March 26, 1986	.006911
March 27-28, 1986	.006920
Israel shekel:	
March 24-28, 1986	N/A
South Korea won:	
March 24, 1986	.001129
March 25-26, 1986	.001128
March 27-29, 1986	.001127
Taiwan N.T. dollar:	
March 24, 1986	.025740
March 25-28, 1986	.025760

(LIQ-03-01 S:COM CIE)

Dated: March 28, 1986.

ANGELA, DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-82)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certi-

fied buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations, (19 CFR 159, Subpart C).

Greece drachma:	
March 31, 1986	$0.006911
Israel shekel:	
March 31, 1986	N/A
South Korea won:	
March 31, 1986	.001127
Taiwan N.T. dollar:	
March 31, 1986	.025760

(LIQ-03-01 S:COM CIE)

Dated: March 31, 1986.

ANGELA, DEGAETANO,
Chief,
Customs Information Exchange.

T.D. 86-83

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
March 3, 1986	$0.064020
March 4, 1986	.064641
March 5, 1986	.062775
March 6, 1986	.063331
March 7, 1986	.063654
Belgium franc:	
March 3, 1986	.021930
March 4, 1986	.022173
March 5, 1986	.021580
March 6, 1986	.021744

March 7, 1986	.021829
Brazil cruzeiro:	
March 3–7, 1986	.072254
Denmark krone:	
March 3, 1986	.121677
March 4, 1986	.122926
March 5, 1986	.119261
March 6, 1986	.120496
March 7, 1986	.120729
Finland markka:	
March 3, 1986	.196271
March 4, 1986	.197941
March 5, 1986	.194742
March 6, 1986	.195695
March 7, 1986	.195848
France franc:	
March 3, 1986	.146391
March 4, 1986	.147645
March 5, 1986	.143575
March 6, 1986	.144928
March 7, 1986	.145243
Germany Deutsche mark:	
March 3, 1986	.450349
March 4, 1986	.454339
March 5, 1986	.441112
March 6, 1986	.445931
March 7, 1986	.446828
Ireland pound:	
March 3, 1986	1.3593
March 4, 1986	1.3720
March 5, 1986	1.3315
March 6, 1986	1.3468
March 7, 1986	1.3505
Italy lira:	
March 3, 1986	.000661
March 4, 1986	.000667
March 5, 1986	.000649
March 6–7, 1986	.000656
Japan yen:	
March 3, 1986	.005566
March 4, 1986	.005587
March 5, 1986	.005511
March 6, 1986	.005577
March 7, 1986	.005573
Netherlands guilder:	
March 3, 1986	.398724
March 4, 1986	.402253
March 5, 1986	.390701

March 6, 1986	.394089
March 7, 1986	.396040
Norway krone:	
March 3, 1986	.142592
March 4, 1986	.143575
March 6, 1986	.140331
March 7, 1986	.140351
Portugal escudo:	
March 3, 1986	.006757
March 4, 1986	.006803
March 5, 1986	.006757
March 6, 1986	.006725
March 7, 1986	.006761
Republic of South Africa rand:	
March 3, 1986	.50380
March 4, 1986	.50530
March 5, 1986	.50300
March 6, 1986	.50130
March 7, 1986	.50120
Spain peseta:	
March 3, 1986	.007126
March 4, 1986	.007186
March 5–6, 1986	.007065
March 7, 1986	.007097
Sweden krona:	
March 3, 1986	.139082
March 4, 1986	.139958
Switzerland franc:	
March 3, 1986	.531915
March 4, 1986	.534188
March 5, 1986	.521921
March 6, 1986	.526593
March 7, 1986	.527287

(LIO–03–01 S:COM CIE)

Dated: March 7, 1986.

ANGLEA DEGAETANO,
Chief,
Customs Information Exchange.

T.D. 86–84

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New

York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 371(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
March 10, 1986	$0.062422
March 11, 1986	.062893
March 12, 1986	.062383
March 13, 1986	.062150
March 14, 1986	.063091
Belgium franc:	
March 10, 1986	.21422
March 11, 1986	.21552
March 12, 1986	.21390
March 13, 1986	.21254
March 14, 1986	.21561
Brazil cruzado:	
March 10–14, 1986	.072254
Denmark krone:	
March 10, 1986	.118554
March 11, 1986	.119318
March 12, 1986	.118252
March 14, 1986	.199546
Finland markka:	
March 10, 1986	.193424
March 14, 1986	.195771
France franc:	
March 10, 1986	.142602
March 11, 1986	.143400
March 12, 1986	.142248
March 13, 1986	.141643
March 14, 1986	.143658
Germany deutsche mark:	
March 10, 1986	.438500
March 11, 1986	.431404
March 12, 1986	.437828
March 13, 1986	.435635
March 14, 1986	.431891
Ireland pound:	
March 10, 1986	1.3265
March 11, 1986	1.3345
March 12, 1986	1.3235
March 13, 1986	1.3160
March 14, 1986	1.3375

Italy lira:	
March 10, 1986	.000644
March 11, 1986	.000649
March 12, 1986	.000644
March 13, 1986	.000640
March 14, 1986	.000650
Japan yen:	
March 10, 1986	.005534
March 11, 1986	.005559
March 12, 1986	.005549
March 13, 1986	.005559
March 14, 1986	.005645
Netherlands guilder:	
March 10, 1986	.388425
March 11, 1986	.391236
March 12, 1986	.387898
March 13, 1986	.385877
March 14, 1986	.391466
New Zealand dollar:	
March 12, 1986	.52950
March 13, 1986	.52900
March 14, 1986	.52800
Norway krone:	
March 11, 1986	.139519
March 14, 1986	.140095
Portugal escudo:	
March 10, 1986	.006678
March 11, 1986	.006718
March 12, 1986	.006667
March 13, 1986	.006653
March 14, 1986	.006734
Republic of South Africa rand:	
March 10, 1986	.50250
March 11, 1986	.50400
March 12, 1986	.50300
March 13, 1986	.50200
March 14, 1986	.50050
Spain peseta:	
March 10, 1986	.006964
March 11, 1986	.007003
March 12, 1986	.006964
March 13, 1986	.006940
March 14, 1986	.007008
Switzerland franc:	
March 10, 1986	.516262
March 11, 1986	.520291
March 12-13, 1986	.517331

March 14, 1986	.524934

(LIQ-03-01 S:COM CIE)
Dated: March 14, 1986

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-85)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
March 17, 1986	$.063371
March 18, 1986	.063251
March 19, 1986	.062992
March 20, 1986	.063141
March 21, 1986	.063452
Belgium franc:	
March 17, 1986	.021720
March 18, 1986	.021725
March 19, 1986	.021594
March 20, 1986	.021654
March 21, 1986	.021758
Brazil cruzado:	
March 17-21, 1986	.072254
Denmark krone:	
March 17, 1986	.120084
March 18, 1986	.120228
March 19, 1986	.119868
March 20, 1986	.120084
March 21, 1986	.120642
Finland markka:	
March 17, 1986	.195618
March 18, 1986	.195695
March 19, 1986	.195503

March 20, 1986	.195848
March 21, 1986	.196870
France franc:	
March 17, 1986	.144613
March 18, 1986	.144561
March 19, 1986	.143616
March 20, 1986	.144165
March 21, 1986	.144949
Germany deutsche mark:	
March 17, 1986	.444444
March 18, 1986	.444840
March 19, 1986	.442184
March 20, 1986	.443164
March 21, 1986	.446030
Ireland pound:	
March 17, 1986	1.3440
March 18, 1986	1.3430
March 19, 1986	1.3372
March 20, 1986	1.3366
March 21, 1986	1.3460
Italy lira:	
March 17, 1986	.000654
March 18, 1986	.000653
March 19, 1986	.000649
March 20, 1986	.000651
March 21, 1986	.000654
Japan yen:	
March 17, 1986	.005691
March 18, 1986	.005714
March 19, 1986	.005647
March 20, 1986	.005670
March 21, 1986	.005688
Netherlands guilder:	
March 17, 1986	.393701
March 18, 1986	.394011
March 19, 1986	.391773
March 20, 1986	.392696
March 21, 1986	.395179
New Zealand dollar:	
March 17, 1986	.53100
March 18, 1986	.52900
March 19, 1986	.53050
March 20, 1986	.53350
March 21, 1986	.53600
Norway krone:	
March 17, 1986	.140805
March 18, 1986	.140647
March 19, 1986	.140056

151-378 O - 86 - 2

March 20, 1986	.140449
March 21, 1986	.140924
Portugal escudo:	
March 17, 1986	.006743
March 18, 1986	.006748
March 19, 1986	.006734
March 20, 1986	.006748
March 21, 1986	.006761
Republic of South Africa rand:	
March 17, 1986	.49850
March 18, 1986	.49950
March 19, 1986	.49100
March 20–21, 1986	.47900
Spain peseta:	
March 17, 1986	.007048
March 18, 1986	.007060
March 19, 1986	.007037
March 20, 1986	.007062
March 21, 1986	.007090
Sweden krona:	
March 17, 1986	.138793
March 18, 1986	.138793
March 20, 1986	.138744
March 21, 1986	.139373
Switzerland franc:	
March 17, 1986	.530504
March 18, 1986	.530926
March 19, 1986	.527704
March 20, 1986	.528123
March 21, 1986	.534045

(LIQ-03-01 S:COM CIE)

Dated: March 21, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-86)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the fol-

lowing countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
March 24, 1986	$0.71810
March 25, 1986	.72100
Austria schilling:	
March 24, 1986	.062247
March 26, 1986	.061087
March 27, 1986	.061237
March 28, 1986	.061050
Belgium franc:	
March 24, 1986	.021354
Brazil cruzado:	
March 24–28, 1986	.072254
Denmark krone:	
March 24, 1986	.118385
France franc:	
March 24, 1986	.142430
Germany deutsche mark:	
March 24, 1986	.437063
Ireland pound:	
March 24, 1986	1.3240
Italy lira:	
March 24, 1986	.000643
March 26–27, 1986	.000631
Japan yen:	
March 24, 1986	.005590
March 25, 1986	.005549
March 26, 1986	.005562
March 27, 1986	.005570
March 28, 1986	.005560
Malaysia dollar:	
March 24, 1986	.388802
March 25, 1986	.388350
March 26, 1986	.389105
March 27, 1986	.388802
March 28, 1986	.388651
Netherlands guilder:	
March 24, 1986	.387297
New Zealand dollar:	
March 24, 1986	.53300
March 25, 1986	.53400
March 26, 1986	.53300
March 27, 1986	.53450
March 28, 1986	.53300

Norway krone:	
March 24, 1986	.139082
Portugal escudo:	
March 24, 1986	.006671
Republic of South Africa rand:	
March 24, 1986	.47850
March 25, 1986	.46250
March 26, 1986	.46900
March 27-28, 1986	.47500
Spain peseta:	
March 24, 1986	.006966
Switzerland franc:	
March 24, 1986	.521241
March 27, 1986	.513611

(LIQ-03-01 S:COM CIE)

Dated: March 28, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-86)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c)), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-19 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzado:	
March 31, 1986	$0.072254
Japan yen:	
March 31, 1986	.005631
Malaysia dollar:	
March 31, 1986	.385060
New Zealand dollar:	
March 31, 1986	.53520
Republic of South Africa rand:	
March 31, 1986	.46500

Spain peseta:	
March 31, 1986	.006873

(LIQ-03-01 S:COM CIE)

Dated: March 31, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY
OFFICE OF THE COMMISSIONER OF CUSTOMS,
WASHINGTON, D.C., *April 15, 1986.*

The following are decisions of the United States Customs Service which are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

(C.S.D. 86-11)

This ruling holds, under the substitution drawback law (19 U.S.C. 1313(b)), that a successor is allowed to designate, as the basis for drawback on articles manufactured by the successor *after* the date of succession, merchandise used by the predecessor *prior* to the date of succession.

Date: October 2, 1985
DRA-1-09-CO:R:CD:D
218254 MM/GS

REGIONAL COMMISSIONER OF CUSTOMS,
Chicago, Illinois 60603

Re: Further Review of Protest Number 3901-5000476 (Chicago)—Drawback Successorship—19 U.S.C. 1313(b)—19 CFR 191.32(a)(3)

DEAR SIR: This is in reply to the application for further review, filed on April 2, 1985, of a decision by the Regional Liquidation Branch not to allow drawback with respect to entries 84-102057-9, 84-104212-0, 84-104213-3, 84-104214-6, 84-102949-9, 84-106059-7, 84-107411-4, 84-110912-8.

Issues: 1. Will a corporation be approved as the successor of a division of another company, assuming all other requirements of successorship are met?

2. For purposes of substitution drawback (19 U.S.C. 1313(b)) may a successor designate as the basis for drawback on articles manu-

factured by it after the date of succession merchandise used by the predecessor prior to the date of succession?

3. For purposes of substitution drawback may a successor designate as the basis for drawback on articles manufactured by it prior to the date of succession merchandise used by the predecessor prior to the date of succession?

Facts: On July 5, 1983, Customs approved a drawback proposal of Occidental Chemical Corporation, PVC Resins Division (abstracted as T.D. 84-2-L) in which proposal Occidental Chemical claimed to be the successor to Firestone Plastics Company, a division of Firestone Tire and Rubber Company, under the latter's contract of September 16, 1980 (abstracted as T.D. 81-91-J).

Based on T.D. 84-2-L, Occidental Chemical, PVC Resins Division, filed the eight drawback entries noted above on which it received accelerated drawback. However these entries were liquidated "no drawback" and the drawback was repaid by Occidental Petroleum on eight U.S. Customs bills dated March 1, 1985. In addition Occidental protested the liquidation of the eight entries and it is this protest we now consider.

Law and Analysis: Occidental Chemical Corporation, PVC Resins Division, is the drawback successor of Firestone Plastics Company, a division of Firestone Tire and Rubber Company, under T.D. 84-2-L. There was precedent permitting a corporation to be successor to a division of another corporation. See for example T.D. 75-71-R.

The next issue to be considered relates to the rights of a successor under substitution drawback. Successorship as a concept was introduced into drawback at least as early as February 4, 1920. See T.D. 38286-G. When substitution drawback was enacted the concept was extended to it (T.D. 52749-N).

The following excerpts are from a Memorandum of June 14, 1963, concerning Headquarters views (at that time) with regard to the passage of drawback rights under successorship.

> When one corporation succeeds another, for drawback purposes the successor takes over whatever drawback rights were held by the predecessor. In the case of operations under 313(a), the form of the drawback right is clearly defined in that it is either in imported merchandise which on the date of succession has not been used by the predecessor, or it is in an article manufactured by the predecessor with the use of imported merchandise. There is no question that if the successor in either case completes the necessary steps under the drawback procedure, he can recover the duties paid on the imported merchandise. In fact then the drawack right does pass from the predecessor to the successor in 313(a) cases.

In the case of operations under section 313(b), the drawback right is less clearly defined, but it is nonetheless present in imported merchandise. In this regard, the Customs Court in the case of *General Motors Corporation* v. *United States,* C.D. 1587, which involved operations under section 313(b), stated at page 97:

> Ordinarily, when merchandise is imported as to which the drawback statute may become applicable, an inchoate right, or a "right accruing," arises, and as the merchandise progresses by way of manufacture or production in the United States, use in certain ways etc., the inchoate or accruing right ripens, until upon exportation of the merchandise or article in accordance with the statute and regulations pertaining thereto, the inchoate or accruing right becomes an absolute right to receive payment, as drawback, of the amounts specified by the statute.

If the drawback right in imported merchandise passes to a successor corporation in the case of operations under section 313(a), it must also pass to the successor in operations under section 313(b), unless such passage is prohibited by the drawback law or regulations. I can find no such prohibition in either section 313(b) of the Tariff Act of 1930, or Part 22 of the Customs Regulations. Pursuing this one step further, if a manufacturer who operates under section 313(b) receives imported merchandise but, before using such merchandise, is succeeded by another corporation, the successor clearly can use the imported merchandise and subsequently designate it as the basis for drawback. If on the other hand, the predecessor used the imported merchandise before the date of succession, there can be no question that the predecessor had a right to designate such merchandise. This right too must pass to the successor for otherwise it is a fallacy to say that a successor takes over the drawback rights held by the predecessor.

The "right to designate" having passed to the successor, the question then arises as to what exportations the imported merchandise covered by the right may be designated against. The predecessor had the right to designate the merchandise against articles manufactured by it after the date of receipt of the imported merchandise. In effect, the date of receipt of the imported merchandise was the date on which the "right to designate" was created, and the predecessor held such right until the date of succession. When the right is transferred by succession, the successor stands in the place of the initial holder of the right and therefore would be able to designate the merchandise covered by the right against articles manufactured by it (the successor) on and after the date on which the right first inured to the successor that is, the date of succession.

There follows an excerpt from the sample format for a successorship statement which was furnished by Customs for preparation of the successorship statement from as early as 1954 until 1979 when it was eliminated for reasons unrelated to the successorship question.

> On (date), the (Old Corporation), was succeeded by (New Corporation), and on the said date (or on (date)) the said (New Corporation) became entitled to all of the drawback rights accrued and accruing to the (Old Corporation) by virtue of the provisions of T.D. ————.

This format was furnished until the regulations were amended (T.D. 79-65) to eliminate supplemental statements (including successorship) in favor of revised statements to modify existing contracts.

Elimination of the supplemental statement was for administrative purposes only. The intent was to enable Customs to have all information relating to a drawback rate for a product in a single drawback statement under its individual Treasury Decision number rather than a rate holder having different rates for different products under one Treasury Decision amended numerous times. There was no intent to change in any way the drawback rights to be transferred from a predecessor to a successor.

It is evident therefore that under direct identification drawback the successor obtains the right to identify for drawback any and all merchandise (or articles) its predecessor could identify. Under substitution drawback the successor receives the right to identify and/or designate any merchandise/articles its predecessor could identify and/or designate. Under substitution drawback the successor receives the right to designate merchandise used by the predecessor as the basis for drawback only on articles manufactured by it after the date of succession.

Denial of drawback in the current case however is based on a ruling made in Service Headquarters on May 8, 1974, which was highlighted in the drawback seminar held in June 1974 and the notes resulting from that seminar. The following was disclosed upon review of that ruling.

A Delaware corporation, with factories in several states, divided itself into several corporations. The factories became separate corporations. One such factory was located in Texas and became the Texas corporation. Prior to formation of the new company 90,000,000 pounds of merchandise had been received at the Texas factory. The physical inventory at the time of formation of the new company was 20,000,000 pounds.

Headquarters was asked the procedures to follow to transfer the drawback rights to the Texas corporation. The reply of November 2, 1973, stated that the Texas corporation was to be treated as a successor and in that capacity could designate the 20,000,000 pounds on hand in inventory. However, when inquiry was made further as to the 70,000,000 pounds that had been used the reply of May 8, 1974, was that the Texas corporation could not designate this material as it had been used by the Delaware corporation, even though it had been held that the Texas corporation was successor.

The May 8, 1974, ruling was inconsistent with the November 2, 1973, ruling as well as the policy of transferring drawback rights under a successorship at that time. There is nothing in the file to support this inconsistency or a change from that policy. When the Texas corporation succeeded the operations at the Texas factory,

all drawback rights accrued or accruing to the predecessor at that factory were transferred to the successor on the date of succession. The May 8, 1974, ruling was incorrect and the traditional perogatives of successorship are reaffirmed.

The substitution drawback law requires that the same legal person use in manufacturing both the designated and substituted merchandise. The current ruling fulfills this requirement, since a successor is considered legally to be a continuation of the predecessor in the domain covered by the successorship.

Holding: 1. A corporation will be approved as the successor of a division of another company, assuming all other requirements of successorship are met.

2. For purposes of substitution drawback (19 U.S.C. 1313(b)) a successor is allowed to designate as the basis for drawback on articles manufactured by it *after* the date of succession merchandise used by the predecessor prior to the date of succession.

3. For purposes of substitution drawback a successor is not allowed to designate as the basis for drawback on articles manufactured by it *prior* to the date of succession merchandise used by the predecessor prior to the date of succession.

You are directed to allow the protest.

Effect on Other Rulings: The unpublished ruling of May 8, 1974, and any other rulings inconsistent with the above policy are hereby revoked.

(C.S.D 86-12)

This ruling holds, pursuant to 19 U.S.C. 1526(e), that counterfeit trademark violations exist on imported articles which bear markings that are indentical to or substantially indistinguishable from registered trademarks (including the names of famous designers) even though the goods produced by the trademark owners are only remotely related to the imported goods. The U.S. Customs Service will not give away or sell goods bearing counterfeit markings as defined in 19 CFR 133.23a unless the offending marks are removed or obliterated. All such goods will be destroyed pursuant to 19 U.S.C. 1611.

Date: October 22, 1985
TMK-3 CO:R:E:E
727744 SO

Mr. EFRAIN PICON,
Assistant District Director, C&V,
U.S. Customs Service,
P.O. Box 2112,
San Juan, Puerto Rico 00903

Dear Mr. PICON: In your memo of November 28, 1984, you asked for advice as to when a trademark recorded for one class of mer-

chandise is protected in another class. Specific problems have been encountered in cases where articles have been imported bearing famous trademarks registered for other lines of merchandise. Examples include (1) men's trousers from the Dominican Republic, hosiery from Panama and men's billfolds from Taiwan, all bearing the "Yves Saint Laurent" trademark (recorded with Customs for perfume and other articles in Class 51); (2) shirts from Panama bearing the "Oscar de la Renta" trademark (recorded for perfumery), and; (3) footwear manufactured in South Korea and imported from Panama bearing the "Kangaroo" trademark (recorded for handbags in Class 18). You asked us to furnish guidelines for use in determining whether the marks in question are "strong" marks.

You also mentioned our trademark recordation for "SEIKO," which states that "SEIKO" is a "strong" mark, and that "strong" marks are protected not only for articles to which the trademark is applied by the trademark owner (in this case watches, clocks and parts thereof in Class 27), but also for other goods which might naturally come from the same trademark owner. Please note that the numbered Classes of merchandise referred to above have been established for purposes of organizing the work of the U.S. Patent and Trade Mark Office and are not legally significant for purposes of establishing Customs' trademark violations.

It is firmly established that the owner of a trademark which is "original, arbitrary, financial, or a strong mark," may exclude or prevent anyone from the use of that trademark, not only for the commodity he manufactures and sells, but for a wide variety of products. Where the mark itself is inherently unique or has been the subject of wide advertising, it is a "strong" trademark. The courts have pointed out such outstanding examples of this type of trademark as "Kodak." or "Aunt Jemima." In these cases, the trademark laws protect the senior user's interest in being able to enter a related field at some future time, with his good reputation intact.

This issue is discussed in the Konica case (C.S.D. 79-410), copy enclosed. In that case, the Konica trademark was found to be a strong mark entitled to protection against infringing importations of watches, even though the "Konica" trademark had been applied exclusively to cameras and camera accessories. While it is not apparent from reading the *Konica* decision, we note that the trademark protected by Customs (Konica) appears in stylized script form. Even though the mark on the inexpensive imported watches was in block letters (KONICA) there was, nevertheless, a "counterfeit" trademark violation.

Applying the above guidelines to the specific questions you raised, we note that the protected trademarks "Yves Saint Laurent," "Oscar de la Renta" and "Kangaroo" are unique or "strong marks." The first two are the names of famous designers of a variety of high quality articles. The unauthorized use of the designers'

names on poor quality items would strongly tend to confuse the public as to the source of those items. While the kangaroo is a creature of nature, its use as a trademark for handbags is unique and not descriptive of the handbags in any way. Through advertising, the "Kangaroo" trademark for handbags has become a "strong mark." Therefore, in our opinion, Customs cannot sanction the unauthorized use of the mark "Kangaroo" on footwear as simply being descriptive of the article. Certainly, the ordinary purchaser at retail would not expect to be buying footwear made of kangaroo hide because the shoes being purchased are marked "Kangaroo." Accordingly, we are of the opinion that the trousers, hosiery, billfolds, shirts and shoes in question, if imported bearing, marks identical with or substantially indistinguishable from the "strong" trademarks "Yves Saint Laurent," "Oscar de la Renta" and "Kangaroo," applied without the authorization of the trademark owners, would be "counterfeit" trademark violations.

Section 526(e) of the Tariff Act of 1930, as amended (19 U.S.C. 1526(e)) provides for the seizure and forfeiture of merchandise bearing a couterfeit mark (within the meaning of section 1127 of Title 15) imported in violation of the provision of section 1124 of Title 15. A "counterfeit" is a spurious mark which is identical with or substantially indistinguishable from, a registered mark (15 U.S.C. 1127; 19 CFR 133.23a(a)).

Section 42 of the Act of July 5, 1946 (commonly referred to as the Lanham Act, 60 Stat. 440, 15 U.S.C. 1124) prohibits the entry at any customhouse of the United States of articles of imported merchandise which shall copy or simulate a U.S. registered trademark, provided a copy of such trademark registration is filed with the Secretary of the Treasury and recorded in the manner provided by regulations (19 CFR 133.1–133.7). Infringement of federally registered trademarks is governed by the test of whether defendant's use is likely to cause confusion, or to cause mistake, or to decive.

When comparing conflicting marks to determine whether or not they are "counterfeit," we must first determine that the marks are "spurious." The term "spurious" refers to marks that are applied to goods without authorization of the trademark owner. Therefore, genuine trademarked articles could not fall within the definition of the term "counterfeit." It is also important to compare the accused mark with the protected mark as it appears on the trademark owner's merchandise, and that the comparison be made from the perspective of an average purchaser rather than an expert. If, upon examination of the marks as they appear on the imported merchandise, an average purchaser would find them to be "the spitting image of," or "substantially indistinguishable" from the trademark owners' merchandise, then a "counterfeit" trademark violation is established. See *Montres Rolex, S.A., Plaintiff-Appellee, against Dennis Snyder, Regional Commissioner, U.S. Customs Service et al.*, U.S. Court of Appeals for the Second Cricuit, 718 F.2d 524; 220

151-378 O - 86 - 3

U.S.P.Q. 10. This was an appeal from a judgment of the U.S. District Court for the Southern District of New York, Vincent L. Broderick, Judge, declaring imported gold watch bracelets to be counterfeits and therefore subject to forfeiture under 19 U.S.C. 1526(e), and directing defendant U.S. Customs Service to dispose of the merchandise.

The imported articles in question, bearing marks which are "counterfeits" of the Customs protected trademarks "Yves Saint Laurent," "Oscar de la Renta" and "Kangaroo," are subject to seizure and forfeiture. The owner of the trademark shall be notified of the seizure and the quantity of the articles seized. Unless the trademark owner, within 30 days of notification, provides written consent to the importation of the articles, exportation, entry after obliteration of the trademark, or other appropriate dispositon, the articles shall be disposed of (after removal or obliteration of the "counterfeit" marks) as follows: (19 CFR 133.23a)

(1) By delivery to federal, state or local government agencies which have a need for them, or

(2) By gift to charitable institutions which have a need for them, or

(3) By sale at public auction, after 1 year from forfeiture, after first determining that no federal, state of local government agency or charity has a need for them, or

(4) By destruction, if they are unsafe or a health hazard.

Please note that there is no preference stated in the law or regulations (19 U.S.C. 1526(e) and 19 CFR 133.52(c)) between options (1) and (2) above, and that option (3) cannot be used unless the district director is satisfied that no government agency or charitable institution needs the goods. While it would appear that 19 U.S.C. 1526(e) authorizes Customs to dispose of forfeited articles with the "counterfeit" marks still in place in cases where it is not "feasible" to remove or obliterate the marks, we are no longer interpreting the law in that manner. We note that the Trademark Counterfeiting Act of 1984 (Public Law 98–473, 18 U.S.C. 2320) imposes criminal sanctions for trafficking in counterfeit goods. If Customs were to sell or give away forfeited articles bearing counterfeit marks, Customs would be acting contrary to the intent of Congress in enacting the Trademark Counterfeiting Act of 1984.

Therefore, articles forfeited to the Government bearing "counterfeit" marks shall no longer be given away or sold pursuant to options (1), (2) or (3) above unless the counterfeit marks are removed or obliterated. In cases where removal or obliteration of the marks is not feasible (the articles would be defaced, or obliteration would be disproportionately expensive considering the value of the articles), the articles shall be destroyed (19 U.S.C. 1611). However, before destroying a shipment of articles which would be useful to a government agency or charity, you may invite the trademark

owner or a potential donee agency or charitable institution to assist in removing or obliterating the "counterfeit" marks.

Copies of this decision will be circulated to all Customs officers for their guidance.

(C.S.D. 86-13)

This ruling holds, pursuant to 19 U.S.C. 1466, that drilling vessels are not subject to vessel entrance and clearance requirements and vessel repair duties at the time they initially "attach" to the outer continental shelf at a point where there is no existing artificial island, installation or other device attached to the seabed for purposes of exploring, developing or producing resources therefrom.

Date: 22 October 1985
VES-3-15/VES-5/VES-13
CO:R:CD:C 107852 PH

JOHN W. MCCONNELL, Jr., Esq.,
Haight, Gardner, Poor & Havens,
Federal Bar Building,
1815 H Street NW., Suite 501,
Washington, D.C. 20006

Dear Mr. MCCONNELL: In your letter of August 14, 1985, you state that recently a client brought a semi-submersible drilling rig from Alaska by way of Peru to a location in the Gulf of Mexico where it was attached to the seabed of the outer continental shelf (OCS) for the purpose of exploring for resources. The owner of the drilling rig sought to make formal entry with the local Customs office but entry was refused on the basis of Legal Determination 3100-02 and a Notice to Steamship Companies/Brokers and Others Concerned issued by the District Director of Customs in New Orleans on September 20, 1984 (84-140 VES-5-07:V:NO:DD TEH).

On the basis of the 1978 Amendments to the Outer Continental Shelf Lands Act of 1953 (OCSLA), you state that you believe that entry should be made and seek a ruling as to when such entry should be made. You state that you believe that equipment purchased for and repairs made to the vessel outside the United States should be subject to duty.

The 1978 amendments to the OCSLA, among other things, changed section 4(1)(a) of the OCSLA (43 U.S.C. 1333(a)(1)) to provide, in part, that the laws of the United States are extended to "* * * the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom * * * to the same extent as if the outer Continential Shelf were an area of exclusive Federal jurisdiction lo-

cated within a State." Before the 1978 amendments, the corresponding part of section 4(a)(1) provided that the laws of the United States are extended to "* * * the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State."

The intent of this change was stated to be "technical and perfecting and * * * meant to restate and clarify and not change existing laws." (House Conf. Report No. 95-1474, p. 80 (1978 U.S.C.C.A.N. 1679)). It was also stated in this Report about this change that the conferees were informed—

> that the U.S. Customs Service has interpreted existing section 4(a)(1) to mean that foreign-built production platforms are not subject to import duties when they are brought into OCS waters and attached to the seabed. Specifically, the Customs Service has stated that such platforms are not actually being imported to the United States until they are placed on the shelf and need not pay customs duties. 1 The conferees reject this interpretation and believe it is contrary to the intent of Congress in enacting the 1953 act. Moreover, to make it explicit that this interpretation should not be continued to be given effect, the conferees state that one of the purposes of this change in 4(a)(1) is to make it clear that U.S. customs duties are to apply to a platform, built overseas, and brought into OCS waters for placement so that it can be used to develop and produce OCS minerals.
>
> Under section 4(a)(1) of the conference report, Federal laws and "civil and political jurisdiction of the United States" are applicable to the subsoil and seabed of the OCS, to all artificial islands and "all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon" to explore, develop, produce or transport OCS mineral resources. Thus customs laws apply—as within the "political and civil jurisdiction" of the United States—to platforms constructed outside the United States and brought into OCS waters—as being "installations and other devices * * * which may be erected thereon".
>
> The Customs Service indicates that once the platforms are in place, machinery, equipment and other items placed on the structure are subject to duties. Of course, the conferees believe this is, and continues to be, the law. [*Supra*, pp. 80, 81.]

In response to the foregoing legislative history, the Customs Service issued Customs Service Decision (C.S.D.) 79-1. This decision held that foreign-built drilling and production platforms which are not vessels are dutiable upon their attachment, whether temporary or permanent, to the seabed of the OCS. The C.S.D. emphasized that only drilling platforms which are not vessels are dutiable

upon attachment to the OCS. It did not make vessels, whether drilling vessels or otherwise, subject to duty (vessels other than yachts and pleasure vessels are not subject to duty under the Tariff Schedules (General Headnote 5(g)), Tariff Schedules of the United States)), nor did it make them subject to vessel entrance and clearance requirements upon initial attachment to the OCS at a point at which there is no existing artificial island or installation or other device attached to the seabed for the purpose of exploring for, developing, or producing resources therefrom.

It was the position of the Customs Service before the 1978 Amendments and remains the position of the Customs Service that drilling vessels are not subject to the vessel entrance and clearance requirements at the time they initially "attach" to the OCS, as stated in the note you referred to in the September 20, 1984, Notice from the District Director of Customs in New Orleans. Accordingly, we concur with the decision of Customs in New Orleans in declining to accept formal entry of your client's drilling rig on its initial attachment to the OCS.

Under 19 U.S.C. 1466, equipments purchased in a foreign country for, and repairs made in a foreign country to a vessel documented under the laws of the United States to engage in the foreign or coasting trade or intended to be employed in such trade are dutiable "on the first arrival of such vessel in any port of the United States." In view of the specific language in section 1466 attaching duties on the first arrival in any *port* of the United States, we conclude that drilling vessels are not subject to vessel repair duties on their initial attachment to the OCS at a point at which there is no existing artificial island or installation or other device attached to the seabed for the purpose of exploring for, developing, or producing resources therefrom.

(C.S.D. 86-14)

This ruling holds that T.D. 85-91, which amended vessel entrance and clearance regulations as they relate to lightering operations, will: (1) apply to service vessels transporting import or export cargo to and from vessels on the high seas; (2) does not affect Customs treatment of aircraft going to and from vessels on the high seas; (3) does not affect the transportation of

passengers to and from vessels on the high seas; and (4) is anticipated to have little effect on outer continental shelf operations (19 CFR 4.3, 4.9, 4.20, 4.60, 112.1(b) and 112.1(f), 19 U.S.C. 1565 and 43 U.S.C. 1333(a)(1)).

Date: November 19, 1985
File: VES-5-18-CO:R:CD:C
107842 PH

To: DARC, Inspection and Control, New Orleans, Louisiana
From: Director, Carriers, Drawback and Bonds Division
Subject: Entry and Clearance of Vessels—Treasury Decision 85-91

With your memorandum of August 1, 1985 (VES-5-V:O:IC JHG), you forwarded a memorandum dated July 24, 1985, from the Port Director at Pascagoula, Mississippi, concerning Treasury Decision 85-91. The Port Director states that he is concerned with the possible changes Treasury Decision 85-91 may effect to the Customs treatment of service vessels and helicopters which transport merchandise and passengers to and from very large crude carriers (VLCC's) outside United States territorial waters. He states that he assumes that service craft bringing merchandise from VLCC's which requires Customs entry would be subject to the vessel entrance and clearance requirements by virtue of the amendments to the Customs Regulations effected by the Treasury Decision. He states that this would pose additional burdens on the service vessel operators but would greatly enhance Customs control of transportation of passengers and merchandise to and from VLCC's. On the negative side of the ledger, he states that the changes would increase the volume of documents and time involved in processing these vessels, some of which perform two or more trips per day to and from VLCC's.

The Port Director also asks about the effect of Treasury Decision 85-91 in the context of Customs Service Decision 85-37. This C.S.D. held, pursuant to 19 U.S.C. 1565 and regulations thereunder, that bonded merchandise to be moved from one place within a port to another must be transported by a Customs licensed and bonded cartman or lighterman. The C.S.D. held that launch service operators, if performing these services, must be licensed and bonded as lightermen. Finally, the Port Director asks about the effect of Treasury Decision 85-91 on offshore drilling operations.

Treasury Decision 85-91 amended sections 4.3, 4.9, 4.20, and 4.60, Customs Regulations (19 CFR 4.3, 4.9, 4.20, and 4.60), to require a vessel to obtain clearance if it is bound for another vessel on the high seas to either: (1) transship export merchandise which it has transported from the United States to that vessel; or (2) receive import merchandise from that vessel and transport the merchandise to the United States. A vessel is required to make vessel entry if it is returning from another vessel on the high seas after either: (1) transporting export merchandise out of the United States and transshipping the merchandise to that vessel; or (2) transporting

import merchandise to the United States after receiving the merchandise from that vessel. Treasury Decision 85-91, as stated therein, was issued to clarify the applicability of the entrance and clearance requirements of the navigation laws to vessels engaged in the lightering of import and export cargo between the United States and vessels located on the high seas.

The Port Director is correct in his assumption that service vessels bringing import merchandise from a vessel on the high seas to a port of the United States would be subject to vessel entrance and clearance requirements. This is also true of service vessels carrying export merchandise from a port of the United States to a vessel on the high seas. Treasury Decision 85-91 does not affect the Customs treatment of helicopters transporting merchandise and/or passengers to and from vessels on the high seas. Customs treatment of helicopters and other aircraft is, of course, governed by Part 6 of the Customs Regulations under which aircraft coming into any area from any place outside the United States (e.g., a vessel on the high seas) shall be entered in such area if landing is made therein and if carrying passengers for hire or commercial cargo (section 6.3, Customs Regulations). Also, the Treasury Decision affects only vessels transporting export or import merchandise or cargo between the United States and a vessel on the high seas, it does not affect such transportation of passengers.

Operators of service vessels which transport merchandise or cargo between the United States and a vessel on the high seas are *not* required to be licensed and bonded as lightermen. Customs Service Decision 85-37 was only concerned with the movement by service vessels of bonded merchandise between places *within* a port (see definition of "cartman" and "lighterman" in section 112.1(b) and (f), referred to in the C.S.D.). A vessel on the high seas is, of course, not within a port.

We anticipate that Treasury Decision 85-91 will have little, if any, effect on drilling operations on the United States outer continental shelf (OCS). Drilling vessels or platforms, artificial islands, and other devices or installations which are attached to the seabed of the OCS for the purpose of exploring for, developing, or producing resources therefrom are treated as if they were located within the United States for purposes of United States law (section 4(a)(1), Outer Continental Shelf Lands Act of 1953, as amended (43 U.S.C. 1333(a)(1))). Customs and navigation laws, including the coastwise laws, laws on entrance and clearance of vessels, and provisions of dutiability of merchandise are applicable to such vessels, islands, and devices or installations (see Treasury Decision 54281, and subsequent rulings on this subject published in the Customs Bulletin as Customs Service Decisions).

Because a drilling vessel, artificial island, or other device or installation attached to the OCS for any of the requisite purposes is treated as if it were a point within the United States, a service

vessel carrying merchandise or passengers between the United States mainland and such a vessel, island, or device or installation should be treated as though it is carrying merchandise between points in the United States. Such transportation, or transportation between drilling vessels, artificial islands, or other devices or installations attached to the OCS for any of the requisite purposes, is limited to coastwise-qualified vessels (i.e., United States-built, owned, and properly documented vessels). Imported merchandise transported from a drilling vessel, artificial island, or other device or installation attached to the OCS for any of the requisite purposes to a point in the United States or another such drilling vessel, artificial island, or other device or installation attached to the OCS has already been subject to entry and duty under the Tariff Schedules and is not treated as import cargo. Merchandise sent foreign from a drilling vessel, artificial island, or other device or installation attached to the OCS for any of the requisite purposes is, of course, treated as export cargo.

We appreciate your effort, and that of the Port Director, in considering this matter and in raising these very appropriate questions about it. Enclosed, for your information, are copies of a recent memorandum and letter also considering the effects of Treasury Decision 85-91.

(C.S.D. 86-15)

This ruling holds that imported merchandise, initially transported under a special permit for immediate delivery to an importer's premises, and is thereafter entered for transportation and exportation and exported, is not eligible for drawback under the substitution same condition drawback law, 19 U.S.C. 1313(j)(3).

Date: December 3, 1985
DRA-1-09-CO:R:CD:D
218407 RB

Issues: (1) Is imported merchandise eligible for drawback under the substitution same condition drawback law, 19 U.S.C. 1313(j)(3), when it is initially transported under a special permit for immediate delivery to the importer's premises, and is thereafter entered for transportation and exportation, and exported?

(2) Is perishable merchandise, such as fresh fruits and vegetables, eligible for drawback under the same condition drawback law, 19 U.S.C. 1313(j)(1) or (3)?

Facts: Fresh fruits and vegetables are imported at various times, and initially shipped under a special permit for immediate delivery to the importer's premises for examination and sorting, as authorized under 19 U.S.C. 1448(b) and 19 CFR 142.21(b). As a result, part of each shipment is entered for consumption, duty-paid, and the

balance is entered for transportation and exportation, and exported. The exported merchandise is made the subject of claims for drawback under the substitution provision of the same condition drawback law, 19 U.S.C. 1313(j)(3), and other imported merchandise entered for consumption, duty-paid, 2 or 3 days prior to the date of exportation is randomly designated as a basis for drawback.

Law and Analysis: (1) It has been observed that "[t]he express provisions relating to drawback under 19 U.S.C. 1313 fundamentally do not apply to imported merchandise until 'after its release from the custody of the Government. It is also acknowledged in this regard that same condition drawback, subsection (j), 'would apply to (imported) articles entered, or withdrawn from warehouse, for consumption' " (citations omitted) (Headquarters letter dated October 24, 1985, file DRA-1-09-CO:R:CD:D 218032 [imported merchandise entered for warehouse, and in Customs custody and control, not eligible for substitution same condition drawback if withdrawn and exported]).

In the present case, when transported to the importer's premises under a special permit for immediate delivery, the subject merchandise is considered as remaining in Customs custody (19 CFR 142.22(b); see T.D. 79-221, 44 F.R. 46794, the notice of proposed rulemaking leading thereto, 43 F.R. 55774 (1978), and T.D. 76-220, 41 F.R. 33248).

When thereafter entered for transportation and exportation, the merchandise continues in Customs custody. See *American Shipping Co.* v. *United States,* 65 Treas. Dec. 178, T.D. 46879. In that case, imported tomatoes, entered for transportation and exportation, were diverted for inspection at the request of the shippers, a consumption entry filed, duty-paid, and an unconditional delivery permit issued for the merchandise. The tomatoes, however, were subsequently exported through error. In denying a claim for refund of duty on the ground that no provision of law than existed justifying such action under the circumstances after the merchandise was released from Customs custody, the Customs Court stated in this respect that "[w]hen the consumption entry was made * * * and the delivery permit issued, possession and control passed from the Government to the importers * * *" (emphasis added) (*supra,* at 180) (also see *United States* v. *Maine Central Railway Co.,* 9 Ct. Cust. Appls., T.D. 38015; and *Illinois Central Railroad Co.* v. *United States,* 2 Cust. Ct. 422, C.D. 168).

Furthermore, in the October 24, 1985, ruling, cited above, concerning imported merchandise entered for warehouse, it was implicit that such merchandise, when withdrawn for exportation or for transportation and exportation, would thereby remain continuously in Customs custody until exported (also see T.D. 4843; and see *Hudson Shipping Co., Inc.* v. *United States,* 18 Cust. Ct. 17, 21, C.D. 1038).

Imported merchandise, initially transported under a special permit for immediate delivery to the importer's premises and then entered for transportation and exportation, and remaining in Customs custody and control, consequently, does not fall within the scope of section 1313, including, in particular, the provisions for same condition drawback under subsection (j).

Parenthetically, even if same condition drawback were applicable herein, the necessity that the claimant have "possession" of the substituted merchandise as contemplated by section 1313(j)(3) would not be met while the merchandise remains in Customs custody and control (see *American Shipping Co., supra*). In addition, it is axiomatic that the designated and substituted merchandise herein would not be fungible and in the same condition, if each is sorted respectively from the same import shipment.

(2) The term "merchandise" as used in section 1313, including subsection (j) thereof, means "goods, wares and chattels of every description" (19 U.S.C. 1401(c)). Assuming that there is compliance with the law and relevant regulations, therefore, perishable goods would be eligible for same condition drawback.

Holdings: (1) Imported merchandise is not eligible for drawback under the substitution same condition drawback law, 19 U.S.C. 1313(j)(3), when it is initially transported under a special permit for immediate delivery to the importer's premises, and is thereafter entered for transportation and exportation, and exported.

(2) Perishable merchandise, such as fresh fruits and vegetables, is eligible for same condition drawback under 19 U.S.C. 1313(j)(1) or (3), assuming that there is compliance with the law and applicable regulations.

(C.S.D. 86-16)

This ruling holds that fungible merchandise, entered temporarily free of duty under bond (TIB) for foreign sales and under consumption entries for domestic sales, may be commingled in storage and manufacture with the TIBs being cancelled on a first-in-first-out basis.

Date: December 9, 1985
CON-9-04-CO:R:CD:D
218370 MM/GS

Issue: If fungible merchandise is entered temporarily free of duty under bond (TIB) under item 864.05, Tariff Schedules of the United States, for foreign sales and under consumption entries for domestic sales, and is then commingled, may the TIBs be cancelled on a FIFO basis and the consumption entries identified for domestic withdrawals?

Facts: Cut rag tobacco will be blended in Germany and imported for use in manufacturing cigarettes. The tobacco to be used for

cigarettes for the domestic market will be entered for consumption with duty being paid thereon. The tobacco to be used for cigarettes for the export market will be entered under item 864.05, TSUS. All the imported tobacco will be fungible (i.e. commercially identical) and will be commingled in storage and manufacture.

Law and Analysis: An importer at the time of importation under item 864.05, TSUS, must have the intent to export the articles produced from the merchandise. If the articles or the merchandise are diverted to the domestic market, the importer is liable under its bond for twice the duties and in addition is subject to a penalty if it is established that the intent to export was not present at the time of exportation. Thus the importer will have to have on hand at all times sufficient merchandise and/or articles to cancel all of the open TIB entries. On the other hand merchandise which is imported under a consumption entry may be exported or used to manufacture articles which are exported.

Commingling of fungible TIB merchandise and other merchandise has previously been approved (C.S.D. 84-12). In the present case the importer proposes to commingle fungible tobacco imported under TIB and consumption entries and to cancel the TIB entries on a FIFO basis. In addition the importer would have on hand at all times sufficient merchandise or articles to cancel all open TIB bonds.

Holding: Fungible merchandise imported under TIB and under consumption entries may be commingled and the TIBs cancelled on a FIFO basis, provided the importer has on hand at all times in the commingled inventory sufficient merchandise (or articles manufactured therefrom) to cancel all outstanding TIBs.

U.S. Customs Service

General Notice

19 CFR Part 175

Supplemental Solicitation of Comments Regarding Tariff Classification of Prefinished Hardboard Siding

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Supplemental Solicitation of Comments.

SUMMARY: By notice published in the Federal Register on March 11, 1986 (51 FR 8338), the public was informed that Customs is reviewing its position regarding the tariff classification of certain imported prefinished hardboard lap siding. Although the merchandise was accurately described in the notice, we believe it is advisable to supplement that description in order to clarify the precise issue in a case remanded to Customs for further review by the Court of International Trade. Therefore, this notice provides a revised description of the merchandise subject to review.

DATE: Comments (preferably in triplicate) must be received on or before April 25, 1986.

ADDRESS: Comments may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202-566-8237).

FOR FURTHER INFORMATION CONTACT: Jeremy N. Baskin, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

Background

By notice published in the Federal Register on March 11, 1986 (51 FR 8338), the public was informed that Customs is reviewing its position regarding the tariff classification of certain imported prefinished hardboard siding. Although the merchandise was accurately described in the notice, because of the technical issue being considered by the Court, the Department of Justice recommends that

we supplement the prior notice in order to clarify the description and avoid any possible doubt regarding the precise merchandise under consideration.

The product in question is a plank of hardboard, 7/16-inch thick, and either 9 or 12 inches wide. Approximately 1-inch from the bottom, a hard plastic locking strip or "spline" is fixed into a groove in the back of each plank. The top edge of each plank is machined to form a groove or "rabbet", which fits the spline in the plank above. The planks are prefinished at the time of importation. Part of the prefinishing process involves the application of a newsprint paper face to the wet wood fiber mat, which mat has a water content of 70 percent. This occurs prior to compression and heat treatment which forms the hardboard planks, and prior to the sawing and finishing operations which form the prefinished siding. Acrylic latex paint is also applied to the planks prior to importation.

As fully discussed in the March 11, 1986, notice, because of the short deadline imposed upon Customs by the Court to report on our decision, Customs must quickly resolve this classification issue. Therefore, comments must be received within 10 days from the date of publication of this notice.

COMMENTS

Before making a determination on this matter, Customs will consider any written comments timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (2 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b) Customs Regulations (19 CFR 103.11(b)), between 9:00 a.m. and 4:30 p.m. on normal business days, at the Regulations Control Branch, Room 2426, U.S. Customs Service Headquarters, 1301 Constitution Avenue NW., Washington, D.C. 20229.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Dated: April 9, 1986.

WILLIAM VON RAAB,
Commissioner of Customs.

[Published in the Federal Register, April 15, 1986, (51 FR 12712)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

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James L. Watson
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Decisions of the United States Court of International Trade

(Slip Op. 86-38)

BADGER-POWHATAN, A DIVISION OF FIGGIE INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, RUBINETTERIE A. GIACOMINI, S.P.A., INTERVENOR

Court No. 85-4-00467

OPINION

[Plaintiff's motion for judgment on the agency record granted. Plaintiff's motion for access to confidential documents under protective order denied.]

(Decided April 2, 1986)

Stewart & Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.*) for plaintiff.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Velta A. Melnbrencis,* Civil Division, Department of Justice, for defendant.

Law Office of Larry Klayman, P.C. (*Larry Klayman, John M. Gurley*) for intervenor.

RESTANI, *Judge:* In this action, plaintiff, Badger-Powhatan, a division of Figgie International, Inc., challenges the method of calculation used to determine the less than fair value (LTFV) margin in the antidumping duty order issued by the United States Department of Commerce International Trade Administration (ITA) regarding certain brass fire protection products from Italy. 50 Fed. Reg. 8354 (1985). Specifically, plaintiff claims ITA erred by failing to recalculate the LTFV margin after the International Trade Commission (ITC) determined that only a subclass of the class of merchandise sold at LTFV is causing material injury to an industry in the United States. Plaintiff has moved for judgment upon the agency record on the merits of its position.[1] CIT Rule 56.1. In re-

[1] Plaintiff also moves for access to confidential documents under protective order. Defendant opposes this motion, contending that release of these documents to plaintiff is unnecessary if the action is remanded for recalculation of the LTFV margin in accordance with plaintiff's position. Plaintiff's counsel indicated at oral argument that should the court remand the ITA final determination for recalculation, there would be no need to reach this issue inasmuch as the agency historically has provided access to such documents at the administrative level. Therefore, the court dismisses this motion without prejudice.

sponse, defendant seeks a remand of the action for a recalculation of the LTFV margin in accordance with the method proposed by plaintiff. Intervenor, Rubinetterie A. Giacomini, S.P.A. (Giacomini), opposes the positions of both plaintiff and defendant. It contends that the original determination is correct and that a recalculation of the LTFV margin is prohibited by statute.

The basic facts underlying this controversy are undisputed. Plaintiff is a domestic producer of brass fire protection products. On January 3, 1984, plaintiff filed an antidumping petition with ITA and ITC pursuant to 19 U.S.C. § 1673a(b) (1982). The petition alleged that imports of brass interior fire protection products were being, or were likely to be, sold in the United States, at less than their fair value. In addition, the petition alleged that such products materially injured or threatened to materially injure the domestic industry producing interior fire protection products. *See* 19 U.S.C. § 1673a(b)(1) (1982); 9 U.S.C. § 1673 (1982 & West Supp. 1985). The petition defined the class or kind of imported merchandise as brass valves, connections, nozzles, and couplings which serve as components in interior fire protection systems to control the flow and direction of water through such systems. The specific products involved were described as:

1. fire hose couplings (1½ and 2½ inch),
2. fog/straight steam nozzles (1½ and 2½ inch),
3. angle-type hose valve (1½ and 2½ inch),
4. wedge-disc hose gate valves (2½ inch),
5. single and double clapper siamese fire department connections (2½ inch inlet and 4 inch outlet),
6. pressure restricting valves, and
7. pressure regulating valves.[2]

On February 21, 1984, in response to plaintiff's petition, ITA published notice of initiation of antidumping investigations. *See* 19 U.S.C. § 1673a(c)(2) (1982) (requires ITA to make determination on petition and, if determination is affirmative, to commence investigation and publish notice in Federal Register); 49 Fed. Reg. 6396 (1984) (notice of initiation of antidumping investigations at issue). The notice of initiation of investigations indicates that the investigations were to cover the seven products described in plaintiff's petition. 49 Fed. Reg. 6396 (1984).

ITC issued a preliminary determination on March 1, 1984, that concluded that there was a reasonable likelihood that the brass fire protection products under investigation were causing material

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[2] In its documents relating to this antidumping investigation, ITA identifies these products by their *Tariff Schedules of the United States* item numbers as well as by their names. 49 Fed. Reg. 47,066 (1984). The products are currently classified under the following *TSUS* numbers:

1. fire hose couplings—657.3540,
2. fog/straight steam nozzles—680.1480,
3. angle-type hose gate valves—680.1440,
4. wedge-disc hose gate valves—680.1430,
5. single and double clapper siamese fire department connections—680.1420,
6. pressure restricting valves—680.1440, and
7. pressure regulating valves—680.2740.

injury to United States industries. *Certain Valves, Nozzles, and Connectors of Brass from Italy for Use in Fire Protection Systems,* U.S.I.T.C. Public. 1500, Investigation No. 731-TA-165 (Preliminary), 49 Fed. Reg. 4046 (1984); 19 U.S.C. § 1673b(a) (1982). On July 10, 1984, ITA published an affirmative preliminary determination of sales at LTFV. 49 Fed. Reg. 28,083 (1984); 19 U.S.C. § 1673b(b) (1982). This determination was also based on an investigation that included all seven products. At that time ITA preliminarily determined the weighted-average margin of sales at LTFV to be 1.16%. *Id.* at 28,083, 28,084.

On November 30, 1984, ITA published its final affirmative determination of sales at LTFV. 49 Fed. Reg. 47,066 (1984). ITA identified the merchandise covered by the investigation as the same seven products. *Id.* at 47,066, 47,067. The determination announced a weighted-average LTFV margin of 3.47% for this class or kind of merchandise. *Id.* at 47,073. Following the signing of the final LTFV determination, the confidential versions of computer printouts containing LTFV margin calculations were disclosed to counsel for both Badger-Powhatan and Giacomini. After examining the data, counsel for Giacomini and Badger-Powhatan identified clerical and factual errors in the analysis. In response to these comments, ITA published an amendment to its final affirmative LTFV determination, changing the weighted-average LTFV margin for all seven categories of merchandise to 1.28%. 50 Fed. Reg. 1099 (1985).

Subsequent to the ITA determination that the seven products were being sold at LTFV, ITC issued its final determination on material injury. *Certain Valves, Nozzles, and Connectors of Brass from Italy for Use in Fire Protection Systems,* U.S.I.T.C. Public. 1649, Investigation No. 731-TA-165 (Final), 50 Fed. Reg. 7971 (1985); 19 U.S.C. § 1673d(b) (1982 & West Supp. 1985). ITC, by majority decision, determined that industries in the United States are materially injured by reason of imports from Italy of single and double clapper siamese connections and pressure-restricting valves. It further found that the other five products from Italy were not causing or threatening to cause material injury to a United States industry.

After being notified of the ITC findings, ITA published an antidumping duty order. *Antidumping Duty Order: Certain Brass Fire Protection Products from Italy,* 50 Fed. Reg. 8354 (1985); 19 U.S.C. § 1673e (1982). The order identified the merchandise covered by the investigation as the original seven products. It then noted the material injury findings of ITC, and issued the following order:

> [T]he Department directs United States Customs officers to assess * * * antidumping duties equal to the amount by which the foreign market value of the merchandise exceeds the United States price for all entries of certain brass fire protection products, which include single and double clapper siamese fire department connections and pressure restricting valves.

50 Fed. Reg. 8354–55. These duties are to be assessed solely on imports of single and double clapper siamese fire department connections and pressure restricting valves from Italy.[3] *Id.* at 8355. The estimated weighted-average antidumping duty margin adopted was that published in the amended final affirmative LTFV determination (1.28%), based on data on the aggregate value of Giacomini's U.S. sales of all seven products. *Id.*; 50 Fed. Reg. 1099.

Plaintiff now moves for judgment upon the agency record on the issue of the propriety of ITA's calculation of the estimated antidumping duty deposit rate based upon the weighted-average LTFV margin for all seven product categories.[4] Plaintiff argues that data relevant to the five product categories not subject to antidumping duties should not have been included in the LTFV margin calculations.[5] Instead, plaintiff contends, the estimated antidumping duty deposit rate should be based solely upon the weighted-average LTFV margin for the two product categories identified in the antidumping order. Defendant responds by agreeing to base future deposits of estimated duties upon a recalculated LTFV margin determined for the two products involved. To this end, it seeks a remand of the action to ITA for recalculation of the LTFV margin and amendment of the order. On the other hand, intervenor Giacomini contends that ITA's use of a weighted-average LTFV margin that includes margins for the entire class or kind is proper under these circumstances. Furthermore, it contends that a recalculation of the LTFV margin would constitute a prohibited second final determination. Intervenor, then, not only challenges the grounds supporting a change in the order, but also ITA's authority to implement such a change.

The first issue the court must address is whether ITA, having rendered its final determination as to the LTFV margin, may now alter the basis of its calculation.[6] It is now well established that

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[3] In an independent proceeding before this court, plaintiff challenged the ability of ITA to issue an order that imposes duties on only a subset of the class or kind of merchandise as to which ITA has made an affirmative LTFV sales determination. This court held that an antidumping duty order cannot direct Customs to assess duties on a product unless ITA determines that it is in a class or kind of merchandise being sold at LTFV *and* ITC determines that the merchandise to be dutied is causing material injury to a domestic industry. *Badger-Powhatan* v. *United States*, 9 CIT ___, 608 F. Supp. 653, 656 (1985). The statute arguably could have been interpreted by the agency and the court to require duties to be imposed on the entire LTFV "class or kind of merchandise," as defined by ITA, so long as any industry in the United States was being injured by reason of imports within the defined class. The court reasoned, however, that ITC was required to determine which industry or industries are injured, according to specific statutory requirements. 19 U.S.C. §§ 1673(2), 1677(4)(A), (10) (1982 & West Supp. 1985). In this case, a majority of the commissioners found seven different industries to exist, only two of which were injured by reason of merchandise in the class defined by ITA. The court went on to approve, as consistent with the statutory scheme, the ITA practice of imposing duties only on merchandise "like" merchandise produced by the injured industry. *Badger-Powhatan*, 9 CIT at ___, 608 F. Supp. at 657.

[4] Plaintiff originally pled three counts against defendant. In its motion for judgment upon the agency record, plaintiff withdrew Counts I and III. Consequently, only Count II of the complaint is at issue here.

[5] These five products constituted 71% of the class or kind of merchandise originally subject to the investigation. *Badger-Powhatan* v. *United States*, 9 CIT ___, 608 F. Supp. 653, 657 n.2 (1985).

[6] In their briefs plaintiff and defendant appear to characterize the proposed recalculation as an amendment to the antidumping order, not as an amendment to ITA's final determination. This characterization is incorrect. It is clear that an antidumping order may not vary the terms of the underlying determination. *Royal Business Machines, Inc.* v. *United States*, 1 CIT 80, 86, 507 F. Supp. 1007, 1012 (1980), *aff'd*, 69 CCPA 61, 669 F. 2d 692 (1982). Because LTFV margins for the various products were not separately stated in the ITA final determination, the determination must be amended if the LTFV margin derived from the seven product categories is in-

Continued

amendment, before or after remand, is appropriate when the agency has utilized a legally improper method in making a determination or when the original determination contains an error of inadvertence or mistake. *Timken Co.* v. *United States,* 10 CIT ___ Slip Op. 86-17 at 9 (Feb. 20, 1986); *Melamine Chemicals, Inc.* v. *United States,* 8 CIT 105, 592 F. Supp. 1338, 1340 (1984); *Timken Co.* v. *United States,* 7 CIT 319, Slip Op. 84-63 at 3 (June 5, 1984); *Gilmore Steel Corp.* v. *United States,* 7 CIT 219, 585 F. Supp. 670, 674 (1984).[7] The court notes that all parties, including intervenor, seemed to accept the concept of amended final determinations when they participated in the calculation of a reduced LTFV margin following the original determination. *See* discussion *supra.*

The question has arisen as to whether the court may remand this matter without considering the merits. There is no indication anywhere in the statutory scheme that the agency, for policy or similar reasons, may simply change a final determination after an antidumping order is issued. If there is such a provision, defendant has not cited it. The court believes, rather that Congress expected a single and prompt final determination. After all, it provided very short time limits for decision-making. *See* 19 U.S.C. § 1673d(a) (1982 & West Supp. 1985). If the agency could amend determinations endlessly, it would be difficult to answer the question as to when a *final* determination would ever be made. The Supreme Court has ruled that the Interstate Commerce Commission cannot, without specific statutory authority, reconsider license and certificate decisions because of policy changes. *American Trucking Association* v. *Frisco Transportation Co.,* 358 U.S. 133, 146 (1958); *United States* v. *Seatrain Lines,* 329 U.S. 424, 429-33 (1947). This principle has been applied in other licensing cases. *See, e.g., Hirschey* v. *Federal Energy Regulatory Commission,* 701 F.2d 215 (D.C. Cir. 1983). This situation is analogous. The original determination and order resulted in a deposit rate which affects both domestic and foreign interests, just as a license decision affects those whose businesses must

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correct. The amended final determination will then be incorporated into the order in accordance with 19 C.F.R. § 353.48 (1985), which reads in pertinent part:

> (b) *Calculation of the amount of the estimated duty to be deposited.* The deposit of estimated antidumping duties for each manufacturers, producer or exporter shall be equal to the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise, as determined in the affirmative final determination of the Secretary or the latest administrative review of such determination under § 353.53, or, if appropriate, under § 353.49.

[7] *Compare with Ceramica Regiomontana, S.A.* v. *United States,* 5 CIT 23, 557 F. Supp. 596 (1983), in which this court held that when a subsidy is eliminated after the issuance of a countervailing duty order, ITA does not have the authority to modify the estimated countervailing duty deposit rate outside the scope of the provisions of 19 U.S.C. §§ 1675(b) (changed circumstances) and 1675(a) (periodic review). *Ceramica Regiomontana* at 29-30, 557 F. Supp. at 602. Intervenor cites *Ceramica Regiomontan* for the proposition that ITA does not have statutory authority to issue a second final determination after issuance of an ITC final material injury determination inasmuch as the cited provisions adequately protect the interests of those seeking change. Contrary to intervenor's position, the court considers *Ceramica Regiomontana* to be consistent with the *Gilmore* line of cases. *Ceramica Regiomontana* involved a situation in which an event occurred *after* the issuance of the order that changed the facts upon which the calculation was made. *Id.* at 24, 557 F. Supp. at 598. In contrast, the case at bar involves a situation in which none of the underlying facts have changed, but one of the parties challenges the basis for the original calculation. Under *Melamine* and *Ceramica Regiomontana,* if the original calculation is in error, then the final determination may be amended; on the other hand, if circumstances affecting the calculation change after the issuance of the order, then the adjustment must be made pursuant to the changed circumstances or periodic review provisions.

be licensed. The statute contains no exceptions to the general rule that these adjudicatory-type decisions, which are relied upon, may later be changed for policy reasons, and the parties have cited no applicable judicial exceptions to the rule. That this principle may give way when errors are committed does not give the agency authority to upset final decisions where no errors have occurred. Therefore, in order to determine if remand is appropriate, the court must rule on plaintiff's motion for judgment on the agency record.

To determine whether ITA erred in not performing the recalculation, the court must ascertain whether Congress intended that a LTV recalculation occur in a situation in which the injury determination narrows the potential scope of the antidumping order and information is available in the administrative record from which to perform the recalculation. The parties offer different theories as to Congress' intent. Intervenor argues that the statutory scheme clearly precludes such a recalculation. Plaintiff argues that the legislative history indicates that a new calculation must be undertaken. Defendant agrees with plaintiff as to the results of this case, but it is difficult to determine if defendant believes it could reasonably arrive at a contrary result in a similiar situation.[8]

The statute, of course, is our primary guide in determining Congress' intent. *United States* v. *Hepp,* 497 F. Supp. 348, 349 (N.D. Iowa 1980), *aff'd,* 656 F.2d 350 (8th Cir. 1981) (citing *Reiter* v. *Sonotone Corp.,* 442 U.S. 330 (1979); *Simpson* v. *United States,* 435 U.S. 6 (1977); *Scarborough* v. *United States,* 431 U.S. 563 (1976)) ("[T]he starting point in any case involving the interpretation of a statute is the statute itself."). Intervenor notes that the statutory scheme provides for, in chronological order, a LTFV final determination (19 U.S.C. § 1673d(a)(1) (1982)), a final injury determination (19 U.S.C. § 1673d(b) (1982) West Supp. 1984)), and a final order (19 U.S.C. § 1673e(a) (1982)). Intervenor argues that there is no room in the statutory scheme for a new determination modifying the LTFV determination where the products found to be causing injury are fewer than the products considered in arriving at the original LTFV margins.[9] Intervenor further argues that the high probability that LTFV margins will be inaccurate in situations in which the margin is based in part on imports not causing material injury is irrelevant. It notes that the LTFV margin contained in the anti-

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[8] The court is of the opinion that if the facts of this case would allow ITA's original opinion to stand as a reasonable exercise of agency discretion, then remand is not appropriate. The court finds no support for remand to alter reasonable discretionary decisions where there is an objecting party. *See* discussion *supra.*

[9] Intervenor notes the possibility of a situation akin to the hypothetical conflicts problem of the endless "renvoi" if commissioners consider margins in making injury determinations, a current practice of some commissioners. *See, e.g., Iron Construction Castings from Canada,* U.S.I.T.C. Public. 1811, Investigation No. 731-TA-263 at 9 n. 34, 15 n. 56, 25, 40-41 (1986), *Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from Canada,* U.S.I.T.C. Public. 1808, Investigation No. 731-TA-254 at 13-14 (1986). Thus far, there has been no court determination sanctioning the use of margins analysis in arriving at an injury determination. If such practice is approved, the possibility of a true endless "renvoi" is too remote to be considered. Margins analysis is also more likely in cases where the margin is small and a negative determination is made. Here the margin will increase, and thus, there is no likelihood of further negative injury determinations as to specific products.

dumping duty order is considered an estimate, and that although the importer is required to deposit these estimated duties, the actual duties will be assessed based on the LTFV margin calculated during the section 751 periodic review. 19 U.S.C. § 1673e(a)(3) (1982) (deposit of estimated antidumping duties); 19 U.S.C. § 1675 (1982 & West Supp. 1985) (periodic review). Therefore, actual duties may vary substantially from estimated deposits even where there is no inconsistency between the ITA and ITC determinations.

Intervenor's argument focuses too closely on what is contained in the statute, without considering what is missing from the express statutory scheme. *United States* v. *Morton,* 104 S. Ct. 2769, 2773, *reh'g denied,* 105 S. Ct. 27 (1984) (statutes should be read as a whole); *Philbrook* v. *Glodgett,* 421 U.S. 707, 713 (1975) (same). Intervenor ignores the fact that Congress failed to tell ITA how to calculate the estimated antidumping duties. For example, 19 U.S.C. § 1673e(a)(3) (1982) states that ITA shall publish an anitdumping duty order which "requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited." This provision does not provide any guidance as to how to calculate the estimated duties to be deposited. The only guidance as to calculation is provided in the overview provision, 19 U.S.C. § 1673 (1982 & West Supp. 1985), which states that once an affirmative LTFV determination and material injury determination are made as to certain merchandise, "then there shall be imposed upon *such merchandise* an antidumping duty * * * in an amount equal to the amount by which the foreign market value exceeds the United States price for *the merchandise.*" (Emphasis added.) This court has defined the term "such merchandise" as merchandise which is both in a class of merchandise being sold at LTFV *and* which is causing material injury to a domestic industry. *Badger-Powhatan* v. *United States,* 9 CIT ___ ___, 608 F. Supp. 653, 656 (1985). Intervenor conceded at oral argument that the term "the merchandise" at the end of that sentence refers to the same merchandise as does the term "such merchandise." Thus, the antidumping duty actually imposed should be based, as far as is possible, on the LTFV margin for the merchandise that is actually subject to the duty. Intervenor argues that section 1673 does not address how estimated antidumping duties should be calculated, but only the manner of calculation of actually imposed duties. The agency, however, may have concluded that it is to calculate estimated deposits in the same way, inasmuch as the initial language of the regulation describing how ITA is to calculate the amount of estimated duty to be deposited, echoes the language of section 1673. 19 C.F.R. § 353.48(b) (1985); *see supra* note 6.[10] It should be noted

[10] If this is so, there apparently was a failure to consider this construction in connection with the *Carbon Steel Pipes* and *Color Television Receivers* administrative decisions discussed *infra.*

that defendant does not argue for this particular construction of its regulation.

Neither the statute, as indicated, nor the legislative history, explicitly refers to the question of recalculation when the ITA and ITC final determinations vary in scope. When such a legislative gap occurs, the court can infer that Congress did not consider the problem at issue. In such a case, "it is incumbent on the court to consider the policies underlying the statutory provision." *Four "H" Corp.* v. *United States,* 9 CIT ___, 611 F. Supp. 981, 984 (1985) (citing *Rose* v. *Lundy,* 455 U.S. 509, 516–18 (1982)).

The court notes the Supreme Court's admonition that in filling interstitial silences in statutes courts must proceed with caution and attend to the view of the administrative entity appointed to enforce the statute. *Ford Motor Credit Co.* v. *Milhollin,* 444 U.S. 555, 565 (1980). Intervenor argues that past ITA actions in cases similar to the one at bar constitute an interpretation of the statute by those officers charged with its administration. If this is so, such an interpretation would be entitled to considerable deference by the court. *Securities Industry Association* v. *Board of Governors,* 104 S. Ct. 2979, 2983 (1984); *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978); *American Lamb Co.* v. *United States,* No. 86-560 at 13 (Fed. Cir. Feb. 28, 1986).

The court has looked at three cases cited by the parties to analyze ITA's decision-making in this area. In two cases relied on by intervenor, in which the ITC material injury determination was narrower in scope than the ITA LTFV determination, ITA, as it did in this case, apparently adopted without change the LTFV weighted-average margin contained in the ITA final determination. *Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea,* 49 Fed. Reg. 9936, 9939 (1984) (final determination of sales at LTFV); 49 Fed. Reg. 20,045 (1984) (antidumping duty order); *Color Television Receivers from Taiwan,* 49 Fed. Reg. 7628, 7638 (1984) (final determination of sales at LTFV), 49 Fed. Reg. 18,337, 18,338 (1984) (antidumping duty order). In contrast, in a third case, ITA recalculated the LTFV margin after the ITC determination eliminated one product from the scope of the order. *High-Capacity Pagers from Japan,* 48 Fed. Reg. 28,682, 28,688 (1983) (final determination of sales at LTFV), 48 Fed. Reg. 37,058, 37,059 (antidumping duty order). Defendant has not offered any explanation of how or why ITA recalculated the margin in the *High-Capacity Pagers* situation, but not in the *Carbon Steel Pipes* and *Color Television Receivers* contexts. In giving weight to an administrative determination, a court should consider not only its consistency with other pronouncements but the validity of the reasoning underlying it. *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275, 287–88 n.5 (1978). Here there is no consistency and ITA offers no explanation for the inconsistency.

The other parties offer various explanations for the mixed results. Plaintiff suggests that the margins would not have been significantly affected in the first two cases, but that a significant difference in the third case mandated a recalculation. The difference, in fact, was significant in the third case, but no facts were presented regarding the potential change in the first two cases. Intervenor notes that the original determination in the third case stated separate LTFV margins for the relevant products. Thus, no amendment of the determination was required. In this case, the LTFV margins were not separately stated for each product, therefore, a recalculation based on review of the record would be required.[11] Although intervenor's explanation is intriguing, there is no statement from the concerned agency that this is its reasoning. In fact, its latest position in this case would indicate that it does not share this view. The court itself has difficulty accepting intervenor's formalistic approach. That approach would make the decision as to whether to apply a more accurate deposit rate solely the result of chance. That is, if ITA decides for whatever unrelated reason to state LTFV margins separately in its final determination, the deposit rates will be fairly accurate. If not, rates totally unrelated to the correct duty may be imposed. Furthermore, even if the three opinions should be harmonized in this way, it is difficult to say that three unexplicated decisions made during a short and recent time period constitute a consistent administrative practice, especially in light of the agency's new position. In any case, if there is an agency practice to be given weight in this case, the court is simply at a loss as to what that practice is.

Plaintiff has directed the court's attention to legislative history which demonstrates the importance that Congress placed on the deposit of the estimated duties. In particular, the report of the House Committee on Ways and Means indicates that the Committee viewed the inclusion of a provision requiring the deposit of estimated during duties as a critical change intended to expedite the assessment of antidumping duties. In discussing the new requirement that merchandise subject to an antidumping order be entered only upon deposit of estimated duties, the Committee stated:

> The Committee feels strongly that this practice [of allowing such merchandise to enter under bond] does not sufficiently deter dumping. Rather, it provides an incentive to exporters and importers to delay in submitting the information necessary to form the basis of an assessment. The Committee believes that the requirement of cash deposits will ensure that complete information will be submitted to the Authority in a timely manner.

[11] In this regard the *High Capacity Pagers* case is similar to *Blaw Knox Construction Equipment Co.* v. *United States*, 8 CIT 210, 596 F. Supp. 476 (1984) (corrected cash deposit instructions issued to Customs based on figures in an annual review determination).

H.R. Rep. No. 317, 96th Cong., 1st Sess. 69 (1979). Under the circumstances of this case, Congress' intent to prevent exporters and importers from delaying in providing information for accurate assessment of duties is furthered by tailoring the LTFV margins to only those products subject to the order. If the estimated duties are substantially less than the actual duties as a result of the failure to recalculate, then exporters and importers will benefit by delaying the calculation of actual duties. This potential problem is compounded by the fact that the first assessment of actual duties may not occur for approximately two years after the issuance of the order, 19 U.S.C. § 1675(a)(1) (1982 & West Supp. 1985), during which time the exporter or importer would deposit only a fraction of the amount of duties necessary to compensate for the dumping.[12]

Reading this legislative history to support recalculation in this case does not conflict with the statutory scheme. That the statute provides for only one final ITA determination is not dispositive. First, as discussed previously, various situations may give rise to valid amended determinations. Second, ITA could have avoided making a new amended determination by providing separate LTFV margins for each product. That, not foreseeing the ITC result, ITA chose to state an average margin for reasons of convenience does not relieve it of the burden of producing a proper calculation from information already available in the original administrative record.[13] In the absence of any definitive guidance it is sufficient justification for the court's conclusion that the result reached is both logical and fair, as well as not unduly burdensome. Therefore, the court concludes that the statutory scheme requires that estimated antidumping duties be as closely tailored to actual antidumping duties as is reasonable given data available to ITA at the time the antidumping order is issued.[14]

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[12] Of course, there is the possibility that in other cases inclusion of the margins of non-injurying products would raise the deposit rate. This possibility does not prevent the conclusion that Congress favors reasonably accurate deposits. In theory, a duty rate that allows the foreign and domestic products to compete on an equal basis is what Congress intended, not a rate that puts the domestic product in an advantageous position.

[13] The recent case of *Alsthom Atlantique* v. *United States*, Nos. 85-2082 and 85-2158 (Fed. Cir. March 24, 1986) left open the question of whether merchandise with de minimus or zero LTFV margins may be included within the scope of ITA determinations. Apparently ITA has allowed this. With this practice in mind, intervenor opines that the court's ruling today would allow a "no duty" situation in certain cases where there are affirmative ITA and ITC decisions. The court suggests that this is not likely. For example, assume products A and B compose the "class or kind of merchandise" being sold at LTFV. Product A has a zero margin and product B has a 10% margin. ITC then determines that there are two domestic industries, one for product A and one for product B. There is a negative determination with regard to industry B. Given the causal nexus required between LTFV imports and injury, it is not likely that ITC will render an affirmative determination as to industry A. Only if product B somehow competes with goods from industry A, could ITC make a positive finding. This seems unlikely, if not impossible, since ITC, in finding that there are two different industries, would have already found that products A and B were not alike, that is, did not have the same uses and characteristics. Assuming, *arguendo*, that the court has not foreseen all possibilities, the court nonetheless concludes that it will not rewrite the statute to avoid hypothetical anomalies. Congress may not have foreseen all of the possible results of separating LTFV and injury decision-making, and Congress may choose to amend the statute if it finds untenable the remote chance of such anomalous results occurring.

[14] Contrary to intervenor's contentions, this court's decision in *Diversified Products Corp.* v. *United States*, 7 CIT 49, 572 F. Supp. 883 (1983), does not dictate otherwise. In *Diversified Products*, ITA requested a remand in order to adjust the deposit rate for Diversified's imports based on a percentage derived from the weighted-average rate computed for all responding firms. Diversified challenged the imposition of estimated cash deposits because ITA had never computed a dumping margin for one of the products of Diversified's primary supplier. The court rejected Diversified's claim, noting that the statute only requires the deposit of *estimated* duties. The court

Continued

There is no room here for a result which would allow the erroneous deposit rate to continue in this case, based on a contrary discretionary or policy decision. Therefore, ITA did make an error which should now be corrected. The recalculation shall be based on information available from the record and an amended final determination shall be issued containing the recalculated LTFV margin. An antidumping duty order will then be issued reflecting the findings of the ITC final affirmative material injury determination and the ITA amended final affirmative LTFV determination.

(Slip Op. 86-39)

Donna Kelly, et al., plaintiffs *v.* Secretary, United States Department of Labor, defendant

Court No. 85-03-00437

Opinion

(Dated April 2, 1986)

Donna Kelley, pro se.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Platte B. Moring, III,* Civil Division, United States Department of Justice, for defendant.

Restani, *Judge:* Defendant moves for clarification of the court's opinion of December 30, 1985, Slip Op. 85-132. In that opinion this court remanded for further consideration the Secretary of Labor's (Secretary's) denial of a petition for trade adjustment assistance filed pursuant to section 221(a) of the Trade Act of 1974, as amended (Act).[1] 19 U.S.C. § 2271(a) (1982). Clarification would appear useful.

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stated that "[t]here is no statutory support for Diversified's theory that if there is insufficient data available to assess absolutely accurate amounts for such duty deposits that they may not be required until the next section 751 review." *Id.* at ____, 572 F. Supp. at 890. *Diversified Products* stands for the proposition that the estimated duty deposit rate does not have to be absolutely accurate. Rather, it may approximate the actual duties when ITA lacks sufficient data to make an accurate calculation. This holding, however, does not indicate that ITA may derive an unnecessarily inaccurate estimated duty deposit in a case in which a more accurate calculation can be made based on available data.

[1] The petition alleged that increased imports of articles like or directly competitive with the cotton and synthetic sewing thread produced at the American Thread Company's (American Thread's) plant in Tallapoosa, Georgia (Tallapoosa plant), contributed importantly to the worker separations or threat of worker separations at the Tallapoosa plant.

The requirements for eligibility to apply trade adjustment assistance are set forth in § 222 of the Act which provides:

> The Secretary shall certify a group of workers as eligible to apply for adjustment assistance under this part if he determines—
>
> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.
>
> For purposes of paragraph (3), the term "contributed importantly" means a cause which is important, but not necessarily more important than any other cause.

19 U.S.C. § 2272 (1982 & Supp I 1983).

A question has been raised as to whether data sheets in the administrative record, upon which the Secretary apparently based his decision, represent sales figures of industrial thread[2] from the Tallapoosa plant alone or from American Thread as a whole. Defendant asserts that these data sheets give sales information from the entire American Thread Company. This claim is not supported by the record. Each of the data sheets is headed "Plant" with the word "Tallapoosa" typed below, thereby indicating that they are plant specific and do not represent company-wide sales. If these data sheets do in fact include sales from various plants, the administrative record should be supplemented to so indicate. If, on the other hand, they are from the Tallapoosa plant alone, the record must be supplemented with data from any other plants operated by American Thread that produce the article in question.[3] Even assuming that the data sheets in question do represent company-wide sales, they are insufficient to support the Secretary's denial of plaintiffs' petition.

Significant worker separations, or the threat thereof, within the meaning of the statute, 19 U.S.C. § 2272(1) (1982 & Supp. I 1983) (*supra* note 1), took place at the Tallapoosa plant, in industrial thread production, during both 1983 and 1984. *See* 29 C.F.R. § 90.2 (1984) (defining "significant number or proportion of the workers"). *Accord* S. Rep. No. 1298, 93d Cong. 2d Sess. 133, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7275. From the record, it is evident that the Secretary considered the period from 1982 through the first eight months of 1984 as relevant for comparison in reviewing plaintiffs' petition. Having so concluded, the Secretary was obliged to conduct the investigation within this period in accordance with law. The record indicates that corporate sales of industrial thread decreased in quantity by twelve percent from 1982 to 1983.[4] Assuming that the data sheets referred to earlier represent company-wide sales of industrial thread, data would appear to have been obtained from American Thread customers accounting for only six percent and eight percent (approximately) of corporate industrial thread sales for 1982 and 1983, respectively. It is of even

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[2] Defendant uses the term "industrial thread" as a synonym for the term "cotton and synthetic sewing thread." In the absence of information to the contrary, the court will equate the two.

[3] The administrative record, in a press release from American Thread, indicates that the Tallapoosa plant was closed due to a need to consolidate and that the consolidation was made necessary by "*increasing imports of* both apparel and *thread.*" Administrative Record at 4 (emphasis added). The need to consolidate should not be viewed as a cause of worker separations distinct from increased imports of articles like or directly competitive with those under consideration, if such imports did in fact contribute importantly to the need to consolidate. If, as defendant now asserts, the articles in question are produced at more than one plant operated by American Thread, and the Tallapoosa plant was closed due to a need to consolidate, survey data from Tallapoosa alone would be insufficient to provide substantial evidence from which to eliminate increased imports of articles like or directly competitive with those produced by the petitioning workers, as contributing importantly to the decline in sales or production, and to the worker separations in question.

[4] According to the record, the value of corporate industrial thread sales between 1982 and 1983 increased by 4%. Apparently based on value rather than quantity, sales during this period are characterized in the record as having increased. There is no indication, however, that the Secretary viewed this "increase" in sales as a failure to satisfy one of the statutory requirements of eligibility to apply for trade adjustment assistance. *See* 19 U.S.C. § 2272(2) (1982 & Supp. I 1983) (*supra* note 1). In any event, the court doubts that, within the meaning of the statute, it is appropriate to classify sales as increasing where sales decrease in quantity, yet increase in value.

greater significance that, according to the record before the court, those companies from which survey data regarding purchases of imports was obtained, and that also decreased purchases, accounted for approximately three percent of American Thread's net decline in sales of industrial thread during this period. The court does not propose to establish a specific level of sales or of a sales decline that must be accounted for in the record. The samplings in the records are so small, however, that they simply cannot provide sufficient support for the Secretary's denial of eligibility to apply for trade adjustment assistance, in the context of the information provided thus far. *See Local 167, International Molders and Allied Workers' Union* v. *Marshall*, 643 F.2d 26, 31 (1st Cir. 1981) (survey accounted for 49% and 68% of sales during relevant period); *United Glass and Ceramic Workers* v. *Marshall*, 584 F.2d 398, 403 (D.C. Cir. 1978) (survey accounted for 21.5% and 38.3% of sales during relevant period); *Stipe* v. *United States Department of Labor*, 9 CIT ___, Slip Op. 85-112 at 4 (October 25, 1985) (survey accounted for 94-9% and 82.4% of sales decline during relevant period); *Estate of Finkel* v. *Donovan*, 9 CIT ___, 614 F. Supp. 1245, 1250-51 (1985) (customers responding to survey accounted for "substantial percentage" of lost sales during relevant period). The figures noted above in the case at bar obviously do not approach even the lowest figures in the above cited cases.

The failure to consider data from customers accounting for more than a slight fraction of American Thread's total sales of the article in question during the 1982-1983 period was repeated by the Secretary in his comparison of the first eight months of 1983 with the same months of 1984. In addition, in Slip Op. 85-132, this court noted that the Secretary should have included in the survey, or indicated on the record the reason for failing to so include, the company that had decreased its purchases of industrial thread during this period by a greater amount than did any other customer of American Thread for which data was given in the record. Defendant questions the relevance of the failure to include in the administrative record survey data from this company, which gave its address as being in Canada. Presumably, trade adjustment assistance is available only if imports *into the United States* contribute importantly to worker displacements. Although survey data from a company operating totally outside the United States thus would appear to be irrelevant, this would not be the case if, for example, the company, although headquartered or having a mailing address outside the United States, operates plants in the United States to which it imports articles like or directly competitive with those under investigation. Without such knowledge about the company in question, the court is unable to rule on the relevance of data from that company.

Finally, the court notes that if the Secretary provides substantial evidence on the record to support his denial of the petition, he need

not give an alternative explanation of what was the precise cause of the worker separations in question. An explanation of any such alternative cause of the consolidation would provide a clearer picture as to what occurred and would bolster the Secretary's conclusion.

Defendant will comply with the remand order contained in Slip Op. 85-132, within sixty days after the date of this memorandum, as ordered by the court in February 28, 1986.

(Slip Op. 86-40]

GLASS PRODUCTS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-1-00001

Before RE, *Chief Judge.*
[Judgment for plaintiff.]

(Decided April 8, 1986)

Ross & Hardies (*John B. Pellegrini*), for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, for the defendant.

MEMORANDUM OPINION AND ORDER

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Mexico, and described on the customs invoices as "crystal votives" or "cristal votives."

The merchandise was classified by the Customs Service as household articles of glass, under item 546.60 of the Tariff Schedules of the United States (TSUS). Consequently, it was assessed with duty at the rate of 30 per centum ad valorem.

Plaintiff protests this classification and contends that the merchandise is properly classifiable under item A548.05, TSUS, as articles of glass not specially provided for, free of duty under the Generalized System of Preferences. Plaintiff has conceded, however, that entry numbers 304099, 304159, 353365, and 353372, are not entitled to duty-free treatment under item A548.05, TSUS, because it has not been supplied the appropriate documentation.

The pertinent statutory provisions of the tariff schedules are as follows:

Classified Under:

Schedule 5, Part 3, Subpart C:

Articles chiefly used in the household or elsewhere for preparing, serving, or storing food or beverages, or food or beverage ingredients; * * * *household articles,* and art and ornamental articles, all the foregoing not specially provided for:

* * *

Other glassware:

* * *

Other:

546.60	Valued over $0.30 but not over $3 each...	30% ad val. [emphasis added].

Claimed Under:

Schedule 5, Part 3, Subpart D:

Articles not specially provided for, of glass:

* * *.

A548.05	Other	10.3% ad val. [1982] [9.6% in 1983].

The question presented is whether, within the meaning of the competing tariff provisions, the imported merchandise is dutiable as household articles of glass, as classified by Customs, or as glass articles not specially provided for, as claimed by plaintiff. In order to decide this issue, the Court must consider "whether the government's classification is correct both independently and in comparison with the importer's alternative." *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 878, *rehg denied,* 739 F.2d 628 (Fed. Cir. 1984); *see E.R. Hawthorne & Co.* v. *United States,* 730 F.2d 1490, 1490 (Fed. Cir. 1984). The Court has approved a stipulation of the facts, and the parties have submitted the action for decision in lieu of trial.

The Court has carefully examined the merchandise, the stipulated facts and supporting papers, the pertinent tariff provisions, and the relevant case law. It is the determination of the Court that plaintiff has satisfied its burden of establishing that the government's classification is wrong, and that its claimed classification is correct. *See* 28 U.S.C. § 2639 (1982); *Jarvis Clark Co.,* 733 F.2d at 878.

The imported articles consist of closed-bottom candle receptacles of glass. They are imported in a variety of shapes, sizes, and colors, and are commercially known as votive cups or votive lights. Each votive has a lug which projects from its bottom, which enables the cups to be inserted into a candleholder, sconce, or other holder. It has been stipulated that the imported merchandise is chiefly used in households as parts of decorative articles of metal, plastic, or

wood. It is further stipulated that the votives are neither freestanding nor self-supporting, and are incapable of any practical use in their condition as imported.

The tariff provision for household articles, item 546.60, TSUS, under which the imported votives were classified, does not provide for parts. *See L & B Products Corp.* v. *United States,* 70 Cust. Ct. 30, 32, C.D. 4404 (1973). It is well established that a tariff provision which does not specifically provide for parts does not include them. *See, e.g., United States* v. *Bruckmann,* 65 CCPA 90, C.A.D. 1211, 582 F.2d 622, 625 (1978); *The Westminster Corp.* v. *United States,* 78 Cust. Ct. 22, 26, C.D. 4687, 432 F. Supp. 1055, 1058, *appeal dismissed,* 64 CCPA 179 (1977). For example, in *Henry A. Weiss, Inc.* v. *United States,* 79 Cust. Ct. 6, C.D. 4706 (1977), the question presented pertained to the classification of parts of a practical joke article, which were classified by Customs as "[t]oys and parts of toys, not specially provided for * * * Other," under item 737.90, TSUS. Plaintiff contended, *inter alia,* that the imported parts were properly classifiable under item 737.65, TSUS, as "practical joke articles." The court explained that "[f]or customs classification purposes, parts of an acticle, and the article itself, are deemed to be separate and distinct articles." *Id.* at 8. Thus, the court concluded that, since the provision for practical joke articles did not specifically provide for parts, the imported parts could not be classified under that item. Accordingly, the court held that the merchandise had been properly classified as "parts of toys," under item 737.90, TSUS. *Id.* at 13.

In its brief, the government acknowledges that "it is well established that an *eo nomine* provision which does not specifically provide for parts does not include parts." Nevertheless, it argues that the general rule is inapplicable to the "broad descriptive provision" for household articles. Defendant attempts to show that the cases relied upon by plaintiff are not persuasive or controlling because they were decided under paragraph 218 of the Tariff Act of 1930. There is no indication, however, that, in enacting the TSUS, the legislature intended to abandon the well-established principle that parts must be specifically mentioned to be classified under a particular tariff item. Indeed, courts which have construed the term household articles under the TSUS have examined cases decided under prior acts for guidance. *See, e.g., Riekes Crisa Corp.* v. *United States,* 84 Cust. Ct. 132, C.D. 4852 (1980); *L. & B. Products Corp.* v. *United States,* 70 Cust. Ct. 32, C.D. 4404 (1973).

The *Tariff Classification Study* makes clear that the TSUS eliminated the product distinctions between the separate provisions for "kitchen and table articles and utensils" and "household articles" other than kitchen and table articles and utensils. *See Tariff Classification Study,* Sched. 5, at 142 (1960). Moreover, in *Riekes Crisa Corp.* v. *United States,* it was determined that "there is no basic distinction between the provisions for 'blown-glass household arti-

cles' in paragraph 218(f) of the Tariff Act of 1930" and the provision for "household articles" which is contained in the TSUS. 84 Cust. Ct. at 134. It is not inappropriate, therefore, for the Court to refer to cases decided under earlier tariff acts to ascertain the meaning of the TSUS provision for household articles.

In *Williams Adams, Inc.* v. *United States,* 56 Cust. Ct. 429, C.D. 2670 (1966), plaintiff challenged the classification of glass plates or dishes. The plates had a small hole "drilled through the bottom at the center [which served] as a means for fitting metal bases or other attachments." The glass plates, which were determined to be parts of household articles, possessed "no independent function and logically would not be substituted for household glassware without holes." *Id.* at 437. Customs classified the imported merchandise as household or table articles under paragraph 218(f) of the Tariff Act of 1930. Plaintiff claimed that the merchandise was classifiable either as manufactures of glass, not specially provided for, or as articles in chief value of glass, other than household table, or kitchen articles. The court stated:

> The imported items of glass, although in the form of candy dishes, cake plates, etc., are designed specifically to be used with various metal bases and columns. They function in the household, not as imported, but as units, attached to and assembled with other substantial components. They possess no independent function and logically would not be substituted for household glassware without holes.
>
> * * *
>
> The law is clear that where there is no provision for "parts" of articles, whether the tariff provision be *eo nomine* or use in character, imported merchandise held to be "parts" will not be susceptible of classification thereunder.

Id. at 437. Consequently, the court sustained the protests, and held that the imported merchandise was properly classifiable as "other glass articles."

The *Adams* rationale was followed in *Hudson Merchandise Co.* v. *United States,* 58 Cust. Ct. 341, C.D. 2980 (1967). In the *Hudson* case, the imported merchandise consisted of parts of small, hourglass-shaped sandtimers. The customs officials classified the merchandise as glass household articles. Plaintiff protested this classification, and claimed that the merchandise was properly classifiable as "manufactures of glass, not specially provided for." *Id.* at 342. The merchandise was not "usable in the home without the addition of plastic stands, housing or similar units." The imported glass articles represented "but a portion of the thing described in the collector's classification." *Id.* at 344. Thus, in view of its finding that "the glass items form complete and independent parts of articles used in the home," the court held that "the collector's classification of the imports as household articles [was] erroneous inasmuch as the applicable modified provision of paragraph 218(f) [did] not pro-

vide for parts of the merchandise described." *Id.* at 346. Ultimately, the court orderd the merchandise reclassified pursuant to the residuary provision of paragraph 218(f) as "other glass articles." *See* 59 Cust. Ct. 67, 68, C.D. 3075 (1967).

Defendant contends that the decision in *L & B Products Corp.* v. *United States,* 70 Cust. Ct. 30, C.D. 4404 (1973), supports the determination of the Customs Service. In the *L & B Products* case, glass jars imported from Canada without lids were classified as "Articles [of glass] chiefly used in the household or elsewhere for preparing, serving, or storing food or beverages," under item 546.52, TSUS. Plaintiff contended that the imported glass articles were "not articles chiefly used in the household or elsewhere * * * but [were] merely parts of such articles, to wit, parts of sugar dispensers or salt and pepper shakers." *Id.* at 31. Plaintiff also relied on the *William Adams* and *Hudson Merchandise* cases for the proposition that "[s]ince the classifying provision for articles chiefly used in the household does not make provision for parts of such articles * * * as a matter of law, the imported glass articles [were] not classifiable under TSUS item 546.42." Defendant contended that the imported merchandise were not parts but were unfinished glass articles.

The *L & B Products* court stated that "whether the imported glass articles be considered 'parts' of articles chiefly used in the household or elsewhere or 'unfinished' articles chiefly used in the household or elsewhere is not the decisive question or issue * * *." *Id.* at 33. The court viewed the issue as one of proof; that is, plaintiff had shown only that the jars were not used as sugar dispensers or salt and pepper shakers. Plaintiff had not demonstrated that the glass jars were not chiefly used in the household. Significantly, the court noted that "Plaintiff's evidence is palpably weaker than the evidence in [*William Adams* and *Hudson Merchandise*]." Hence, the court held that plaintiff had failed to overcome the presumption of correctness that attached to Customs' classification.

In this case, the level of proof is demonstrably different from the *L & B Products* case. There is no dispute that the merchandise is incapable of use in its condition as imported. In addition, it has been stipulated by the parties that the merchandise is used in households as *parts* of decorative articles of metal, plastic, or wood. Item 546.60, TSUS does not provide for parts of household articles. *See L & B Products Corp.* v. *United States*, 10 Cust. Ct. 30, 32, C.D. 4404 (1973).

None of the cases cited by defendant support its contention that the provision for household articles encompasses the imported merchandise. Defendant argues that the imported votive cups are articles used in the home, and, therefore, have been properly classified. Yet, it is stipulated, and an examination of the merchandise shows, that the votive cup is merely *a part* of decorative articles used in the home. The applicable precedents make clear that a glass article

which can be used only as a part of another article used in the home cannot be classified as a household article. *See Hudson Merchandise Co., supra,* 58 Cust. Ct. at 344. Thus, the Court holds that the votives have been improperly classified under item 546.60, TSUS. The Court also holds that the merchandise should be classified as articles of glass not specially provided for, pursuant to item 548.05, TSUS.

Finally, it should be noted that plaintiff has conceded that this Court lacks jurisdiction over entry numbers 353364, 353365, and 353367, because the protests were filed more than 90 days after the entries were liquidated. Consequently, the protests pertaining to entry numbers 353364, 353365, and 353367, are dismissed. Likewise, plaintiff has conceded that the merchandise covered by entry numbers 304099, 304159, and 353372 are not entitled to duty-free treatment. Hence, the merchandise for these entries are dutiable at the applicable rate of duty for the year of entry.

In view of the foregoing, it is the determination of the Court that the imported merchandise was improperly classified under the provision for household articles. The Court has also determined that the merchandise is properly classifiable as glass articles not specially provided for, under item 548.05, TSUS. Judgment for plaintiff will issue accordingly.

APRIL 16, 1986

NOTICE OF PROPOSED RULE CHANGES

The Committee on Rules and Practice of the United States Court of International Trade is considering several proposed amendments to the Rules of the Court.

The proposed amendments pertain to Rules 3, 4, 47, 48, 60, 62 and 75.

The Committee invites comment on the proposed amendments, along with suggestions for additional changes in the Rules.

Those who wish to present their views should submit an original and one copy of a written statement to the Committee, in care of Joseph E. Lombardi, Clerk of Court, by the close of business on Friday, May 16, 1986. Each statement shall be typewritten and not more than 10 double-spaced pages in length. It also should bear an indication whether the views contained therein are solely those of the author or are submitted on behalf of a particular organization.

Copies of the proposed amendments may be obtained by writing the Clerk of Court or by calling 212-264-2800.

Index

U.S. Customs Service

Treasury Decisions

Customs Service Decisions

U.S. Court of International Trade

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